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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 727

**THE SHAMROCK OIL AND GAS CORPORATION,
PETITIONER,**

vs.

**G. OBIE SHEETS AND CHESTER SHEETS, DOING
BUSINESS AS FRIONA INDEPENDENT OIL COM-
PANY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED JANUARY 20, 1941

CERTIORARI GRANTED MARCH 19, 1941

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CAPTION.

BE IT REMEMBERED that at a term of the District Court of the United States in and for the Northern District of Texas, Amarillo Division, at Amarillo, Texas, begun and holden on the 18th day of September, 1939, and which was adjourned on May 11, 1939, the Honorable James C. Wilson, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

CIVIL ACTION No. 73,

THE SHAMROCK OIL AND GAS CORPORATION,

Complainant,

versus

G. OBIE SHEETS AND CHESTER SHEETS, doing business as FRIONA INDEPENDENT OIL COMPANY,

Defendants.

2 PLAINTIFF'S ORIGINAL PETITION.

Filed: 5-11-39, 7-1-39.

In the 108th District Court of Potter County, Texas.

No. 14531.

State of Texas,

County of Potter.

Comes now The Shamrock Oil and Gas Corporation hereinafter called Plaintiff, complaining of G. Obie Sheets

and Chester Sheets, forming the partnership of and doing business as and in the name Friona Independent Oil Company, hereinafter called defendants, and for cause of action would allege and show:

1.

That the plaintiff is a corporation incorporated under the laws of the State of Delaware and holding a permit from the Secretary of State of the State of Texas, to do business in the State of Texas with an office and place of business in Amarillo, Potter County, Texas; that the defendants reside in Parmer County, Texas.

2.

That heretofore on the various dates set out in the attached Exhibit "A" to which reference is here made and same is made a part hereof by reference, the plaintiff, at the special instance and request of the defendants, sold and delivered to the defendants the various goods, wares and merchandise set out in the attached Exhibit "A" charging the defendants therefor the usual, customary and reasonable amount for said goods, wares and merchandise upon the dates that said goods, wares and merchandise were furnished and delivered to the defendants.

3.

Plaintiff would further show that upon various dates the defendants paid to plaintiff various sums upon the account due and owing by defendants to plaintiff, all as is set out in the attached Exhibit and that said sums and each and all of said sums so paid by defendants to plaintiff were duly credited upon the account due and owing by defendants to plaintiff.

Plaintiff would allege and show that as is set out in the attached account that the defendants are indebted to the plaintiff in the balance of \$5390.42 and that though often requested the defendants have failed and refused to pay the balance of said account in such sum or any part thereof to the plaintiff's damage in the amount of its debt.

Wherefore, premises considered plaintiff prays that the defendants be cited to appear herein and that upon final hearing the plaintiff have and recover judgment of and against the defendants jointly and severally for the amount of its debt as set out in the attached verified account, together with interest thereon at the legal rate from the respective dates that said sum was due, for costs of suit and for such other and further relief to which plaintiff may show itself entitled.

UNDERWOOD, JOHNSON,
DOOLEY & WILSON,
Attorneys for Plaintiff.

EXHIBIT "A."

Friona Independent Oil Company,

Friona, Texas.

Statement of Account.

Date	Invoice Number		Debit	Credit	Balance
June 16	61459	255 gal. 70-72	13.71		
		805 gal. 3rd grade	37.23		
		State Tax	42.40		
		Federal Tax	10.60		102.03
17	61500	1060 gal. 3rd grade	49.03		
		State Tax	42.40		
		Federal Tax	10.60		2702.03
17	61520	504 gal. 70-72	27.09		
		556 gal. 3rd grade	25.72		
		State Tax	53.00		
		Federal Tax	10.60		116.41
17	89	Lube Oil	26.01		26.01

18	61548	242 gal. 70-72	13.01	
		892 gal. 3rd grade	41.26	
		State Tax	45.36	
		Federal Tax	11.34	110.97
19	61592	1059 gal. 3rd grade	48.98	
		State Tax	42.36	
		Federal Tax	10.59	101.93
20	61628	1057 gal. 3rd grade	48.89	
		State Tax	42.28	
		Federal Tax	10.59	101.74
21	61668	254 gal. 70-72	13.65	
		803 gal. 3rd grade	37.14	
		State Tax	42.28	
		Federal Tax	10.57	103.64
21	61715	1059 gal. 3rd grade	48.98	
		State Tax	42.36	
		Federal Tax	10.59	101.93
21	107	Greases	17.40	17.40

Date 1938	Invoices Number		Account		Balance
			Debit	Credit	
21	110	Lube Oil	19.80		19.80
22	61744	254 gal. 70-72	13.65		13.65
		803 gal. 3rd grade	37.14		37.14
		State Tax	42.28		42.28
		Federal Tax	10.57		103.64
23	61785	1057 gal. 3rd grade	48.89		48.89
		State Tax	42.28		42.28
		Federal Tax	10.57		101.74
23	61818	1052 gal. 3rd grade	48.66		48.66
		State Tax	42.08		42.08
		Federal Tax	10.52		101.26
23	61832	254 gal. 70-72	13.65		13.65
		803 gal. 3rd grade	45.17		45.17
		State Tax	42.28		42.28
		Federal Tax	10.57		111.67
24	61864	1056 gal. 3rd grade	48.84		48.84
		State Tax	42.24		42.24
		Federal Tax	10.56		101.64

26	61960	255 gal. 70-72	14.03
		805 gal.	38.24
		State Tax	42.40
		Federal Tax	10.60
			105.27
27	45002	1059 gal. 3rd grade	50.30
		State Tax	42.36
		Federal Tax	10.59
			103.25
28	56265	1057 gal. 3rd grade	50.21
		State Tax	42.28
		Federal Tax	10.57
			103.06
28	56294	556 gal. 70-72	30.58
		503 gal. 3rd grade	23.89
		State Tax	42.36
		Federal Tax	10.59
			107.42
June 23	119	Lube Oil	19.80
28	135	Lube Oil	6.90
28	137	Greases	11.63
29	56328	502 gal. 70-72	27.61

Date 1933	Invoice Number		Account		Balance
			Debit	Credit	
		554 gal. 3rd grade		26.32	
		State Tax		52.80	
		Federal Tax	117.29	10.56	
30	56400	254 gal. 70-72		13.97	
		802 gal. 3rd grade		38.10	
		State Tax		42.24	
		Federal Tax	104.87	10.56	
July 1	150	Lube Oil & Greases		26.72	
3	156	Lube Oil		19.98	
1	56457	1056 gal. 3rd grade		50.16	
		State Tax		42.24	
		Federal Tax		10.56	
July 2	45674	254 gal. 70-72		14.29	
		802 gal. 3rd grade		38.10	
		State Tax		42.24	
		Federal Tax		10.56	
2	45078	1133 gal. 3rd grade		53.82	

3	45097	State Tax	45.32	
		Federal Tax	11.33	110.47
		553 gal. 70-72	31.11	
		501 gal. 3rd grade	23.80	
		State Tax	42.16	
		Federal Tax	10.54	107.61
		1128 gal. 3rd grade	53.58	
		State Tax	45.12	
		Federal Tax	11.28	109.98
		1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
		1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86
		1130 gal. 3rd grade	53.68	
		State Tax	45.20	
		Federal Tax	11.30	110.18

Date	Invoice Number		Account		Balance
			Debit	Credit	
1939 4	45166	1053 gal. 3rd grade		50.02	
		State Tax		42.12	
		Federal Tax	102.67	10.53	
4	45176	1056 gal. 3rd grade		50.16	
		State Tax		42.24	
		Federal Tax	102.96	10.56	
July 5	45214	553 gal. 70-72		31.11	
		501 gal. 3rd grade		23.80	
		State Tax		42.16	
		Federal Tax	107.61	10.54	
5	45242	1053 gal. 3rd grade		50.02	
		State Tax		42.12	
		Federal Tax	102.67	10.53	
4	164	Lube Oil	25.50		
6	174	Lube Oil	14.49		
6	45270	1053 gal. 3rd grade		50.02	
		State Tax		42.12	
		Federal Tax	102.67	10.53	

6 45304 253 gal. 70-72 14.23
 800 gal. 3rd grade 38.00
 State Tax 42.12
 Federal Tax 10.53
 104.88

8 45409 1053 gal. 3rd grade 50.02
 State Tax 42.12
 Federal Tax 10.53
 102.67

July 8 45431 500 gal. 70-72 28.13
 552 gal. 3rd grade 26.22
 State Tax 52.60
 Federal Tax 10.52
 117.47

8 45441 241 gal. 70-72 13.56
 890 gal. 3rd grade 42.28
 State Tax 45.24
 Federal Tax 11.31
 112.39

8 195 Lube Oil 2.76

9 45472 1127 gal. 3rd grade 53.53
 State Tax 45.08
 Federal Tax 11.27
 109.88

Date 1939	Invoice Number	Account		Balance
		Debit	Credit	
9	45480	1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
9	45487	1056 gal. 3rd grade	50.16	
		State Tax	42.24	
		Federal Tax	10.56	102.96
July 10	45518	1127 gal. 3rd grade	53.53	
		State Tax	45.08	
		Federal Tax	11.27	109.88
10	45519	500 gal. 70-72	28.13	
		552 gal. 3rd grade	26.22	
		State Tax	42.08	
		Federal Tax	10.52	106.95
10	45530	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.35	102.67
10	201	Greases	18.00	18.00

11	45670	1052 gal. 3rd grade	49.97
		State Tax	42.08
		Federal Tax	10.52
			102.57
11	45585	1053 gal. 3rd grade	50.02
		State Tax	42.12
		Federal Tax	10.53
			102.67
12	207	Lube Oil	20.35
			20.35
12	45608	1053 gal. 3rd grade	50.02
		State Tax	42.12
		Federal Tax	10.53
			102.67
12	45641	1051 gal. 3rd grade	49.92
		State Tax	42.04
		Federal Tax	10.51
			102.47
July 12	45647	253 gal. 70-72	14.23
		800 gal. 3rd grade	38.00
		State Tax	42.12
		Federal Tax	10.53
			104.88
13	45687	203 gal. 70-72	14.23
		799 gal. 3rd grade	37.85

Date 1938	Invoice Number		Account		Balance
			Debit	Credit	
14	210	State Tax	42.08		
		Federal Tax	10.52		
		Greases	16.50		
14	45718	1056 gal. 3rd grade	50.16		
		State Tax	42.24		
		Federal Tax	10.56		
14	45740	253 gal. 70-72	14.23		
		800 gal. 3rd grade	38.00		
		State Tax	42.12		
		Federal Tax	10.53		
14	45753	1056 gal. 3rd grade	50.16		
		State Tax	42.24		
		Federal Tax	10.56		
15	45770	255 gal. 70-72	14.34		
		804 gal. 3rd grade	38.19		
		State Tax	42.36		
		Federal Tax	10.59		
					105.48

16	45842	254 gal. 70-72	14.29
		802 gal. 3rd grade	38.10
		State Tax	42.24
		Federal Tax	10.56
			<u>105.19</u>
16	45870	254 gal. 70-72	14.29
		801 gal. 3rd grade	38.05
		State Tax	42.20
		Federal Tax	10.55
			<u>105.09</u>
17	45903	1057 gal. 3rd grade	50.21
		State Tax	42.28
		Federal Tax	10.57
			<u>103.06</u>
18	45957	1055 gal. 3rd grade	50.11
		State Tax	42.20
		Federal Tax	10.55
			<u>102.86</u>
19	45980	1056 gal. 3rd grade	50.16
		State Tax	42.24
		Federal Tax	10.56
			<u>102.96</u>
19	46013	253 gal. 70-72	14.23
		800 gal. 3rd grade	38.00

Date 1938	Invoice Number		Account		Balance
			Debit	Credit	
		State Tax	42.12		
		Federal Tax	10.53		104.88
July 18	230	Greases	20.45		20.45
		1056 gal. 3rd grade	50.16		
20	45035	State Tax	42.24		
		Federal Tax	10.56		102.96
		554 gal. 70-72	31.16		
21	46134	502 gal. 3rd grade	23.85		
		State Tax	42.24		
		Federal Tax	10.56		107.81
		1057 gal. 3rd grade	50.21		
22	46153	State Tax	42.28		
		Federal Tax	10.57		103.06
		502 gal. 70-72	28.24		
22	46179	555 gal. 3rd grade	26.36		
		State Tax	52.85		
		Federal Tax	10.57		118.02

22	248	Lube Oil	20.35	20.35
24	46262	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86
July 25	26292	1057 gal. 3rd grade	50.21	
		State Tax	42.28	
		Federal Tax	10.57	103.06
25	46338	254 gal. 70-72	14.29	
		802 gal. 3rd grade	38.10	
		State Tax	42.24	
		Federal Tax	10.56	105.19
25	252	Lube Oil	10.56	105.19
26	46367	1056 gal. 3rd grade	50.16	
		State Tax	42.24	
		Federal Tax	10.56	102.96
27	46477	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86

Date 1938	Invoice Number	Description	Account		Balance
			Debit	Credit	
26	255	Lube Oil	19.98		
28	263	Lube Oil	5.64		
28	46492	254 gal. 70-72	14.29		
		802 gal. 3rd grade	38.10		
		State Tax	42.24		
		Federal Tax	10.56		
			105.19		
28	46527	253 gal. 70-72	14.23		
		800 gal. 3rd grade	38.00		
		State Tax	42.12		
		Federal Tax	10.53		
			104.88		
28	46540	1057 gal. 3rd grade	50.21		
		State Tax	42.28		
		Federal Tax	10.57		
			103.06		
29	268	Lube Oil	11.28		
29	46574	1055 gal 3rd grade	50.11		
		State Tax	42.20		
		Federal Tax	10.55		
			102.86		

30	46610	1056 gal. 3rd grade	50.16	
		State Tax	42.24	
		Federal Tax	10.56	102.96
30	46645	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.53	102.67
30	273	Lube Oil	20.35	20.35
Aug. 1	46695	554 gal. 70-72	31.16	
		502 gal. 3rd grade	23.85	
		State Tax	42.24	
		Federal Tax	10.56	107.81
1	46741	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.53	102.67
2	46754	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.96
2	46789	1053 gal. 3rd grade	50.02	
		State Tax	42.12	

Date 1938	Invoice Number		Account		Balance
			Debit	Credit	
		Federal Tax	102.67		10.53
3	46855	1053 gal. 3rd grade		50.02	
		State Tax		42.12	
		Federal Tax	102.67		10.53
4	46910	253 gal. 70-72		14.23	
		799 gal. 3rd grade		37.95	
		State Tax		42.08	
		Federal Tax	104.78		10.52
4	46925	553 gal. 70-72		31.11	
		501 gal. 3rd grade		23.80	
		State Tax		52.70	
		Federal Tax	118.15		10.54
Aug. 5	46979	253 gal. 70-72		14.23	
		799 gal. 3rd grade		37.95	
		State Tax		42.08	
		Federal Tax	104.78		10.52
5	46992	254 gal. 70-72		14.29	
		801 gal. 3rd grade		38.05	

	State Tax	42.20	
	Federal Tax	10.55	105.09
6 62032	1052 gal. 3rd grade	49.97	
	State Tax	42.08	
	Federal Tax	10.52	102.57
7 62072	1052 gal. 3rd grade	49.97	
	State Tax	42.08	
	Federal Tax	10.52	102.57
8 62091	253 gal. 70-72	14.23	
	800 gal. 3rd grade	38.00	
	State Tax	42.12	
	Federal Tax	10.53	104.88
8 62116	1052 gal. 3rd grade	49.97	
	State Tax	42.08	
	Federal Tax	10.52	102.57
9 62173	253 gal. 70-72	14.23	
	799 gal. 3rd grade	37.95	
	State Tax	42.08	
	Federal Tax	10.52	104.78

Date 1938	Invoice Number		Account		Balance
			Debit	Credit	
9	303	Grease	15.35		15.35
10	62195	1055 gal. 3rd grade	50.11		50.11
		State Tax	42.20		42.20
		Federal Tax	10.55		102.86
11	311	Lube Oil	11.28		11.28
11	62268	1053 gal. 3rd grade	50.02		50.02
		State Tax	42.12		42.12
		Federal Tax	10.53		102.67
12	62328	253 gal. 70-72	14.23		14.23
		800 gal. 3rd grade	38.00		38.00
		State Tax	42.12		42.12
		Federal Tax	10.53		104.88
12	62358	522 gal. 70-72	31.05		31.05
		500 gal. 3rd grade	23.75		23.75
		State Tax	52.60		52.60
		Federal Tax	10.52		117.92
15	62445	300 gal. 70-72	16.88		16.88
		756 gal. 3rd grade :	35.91		35.91

17	62568	State Tax	42.24	
		Federal Tax	10.56	105.59
		254 gal. 70-72	14.29	
		802 gal. 3rd grade	38.10	
		State Tax	42.24	
		Federal Tax	10.56	105.19
17	334	Lube Oil	5.64	5.64
19	62692	501 gal. 70-72	28.18	
		553 gal. 3rd grade	26.27	
		State Tax	42.16	
		Federal Tax	10.54	107.15
19	340	Lube Oil	20.35	20.35
Aug. 23	62347	501 gal. 70-72	28.18	
		553 gal. 3rd grade	26.27	
		State Tax	42.16	
		Federal Tax	10.54	107.15
26	62993	502 gal. 70-72	28.24	
		554 gal. 3rd grade	26.32	

Date 1938	Invoice Number	Account		
		Debit	Credit	Balance
				107.36
		State Tax	42.24	
		Federal Tax	10.56	
27	63058	501 gal. 70-72	28.18	
		553 gal. 3rd grade	26.27	
		State Tax	52.70	
		Federal Tax	10.54	117.69
26	361	Lube Oil	19.98	19.98
29	63129	501 gal. 70-72	28.18	
		553 gal. 3rd grade	26.27	
		State Tax	42.16	
		Federal Tax	10.54	107.15
31	63221	253 gal. 70-72	13.60	
		800 gal. 3rd grade	36.00	
		State Tax	42.12	
		Federal Tax	10.53	102.25
31	281	Lube Oil	19.98	19.98
Sept. 2	63275	1056 gal. 3rd grade	47.52	

	State Tax	42.24
	Federal Tax	10.56
		<hr/> 100.32
3	63329	
	254 gal. 70-72	13.65
	802 gal. 3rd grade	36.09
	State Tax	42.24
	Federal Tax	10.56
		<hr/> 102.54
4	63357	
	254 gal. 70-72	13.65
	803 gal. 3rd grade	36.14
	State Tax	42.28
	Federal Tax	10.57
		<hr/> 102.64
3	390	
	Lube Oil	8.46
		<hr/> 8.46
6	63429	
	255 gal. 70-72	13.71
	807 gal. 3rd grade	36.32
	State Tax	42.48
	Federal Tax	10.62
		<hr/> 103.13
7	63450	
	505 gal. 70-72	27.14
	558 gal. 3rd grade	25.11
	State Tax	53.15
	Federal Tax	10.63
		<hr/> 116.03

Date 1938	Invoice Number		Account		Balance
			Debit	Credit	
8	63519	255 gal. 70-72	13.71		
		806 gal. 3rd grade	36.27		
		State Tax	42.44		
		Federal Tax	10.61		103.03
9	63555	1060 gal. 3rd grade	47.70		
		State Tax	42.40		
		Federal Tax	10.60		100.70
10	63600	255 gal. 70-72	13.71		
		804 gal. 3rd grade	36.18		
		State Tax	42.36		
		Federal Tax	10.59		102.84
11	63645	1056 gal. 3rd grade	47.52		
		State Tax	42.24		
		Federal Tax	10.56		100.32
10	413	Lube Oil	5.64		5.64
11	417	Lube Oil	23.17		23.17
Sept. 12	63701	254 gal. 70-72	13.65		
		802 gal. 3rd grade	36.09		

13	63711	State Tax	42.24	
		Federal Tax	10.56	102.54
		<hr/>		
		806 gal. 3rd grade	36.27	
		State Tax	32.24	
		Federal Tax	8.06	
		255 gal. Kerosene	12.11	88.68
		<hr/>		
13	63748	804 gal. 3rd grade	36.18	
		255 gal. Kerosene	12.11	
		State Tax	32.16	
		Federal Tax	8.04	88.49
		<hr/>		
13	425	Grease	7.00	7.00
		<hr/>		
14	63776	255 gal. 70-72	13.71	
		805 gal. 3rd grade	36.23	
		State Tax	42.40	
		Federal Tax	10.60	102.94
		<hr/>		
14	63813	1060 gal. 3rd grade	47.70	
		State Tax	42.40	
		Federal Tax	10.60	100.70
		<hr/>		
15	431	Lube Oil	19.98	19.98

Date 1938	Invoice Number		Account		Balance
			Debit	Credit	
16	442	Greases	8.78		8.78
16	63917	255 gal. 70-72	13.71		13.71
		806 gal. 3rd grade	36.27		36.27
		State Tax	42.44		42.44
		Federal Tax	10.61		10.61
16	63933	1061 gal. 3rd grade	47.75		47.75
		State Tax	42.44		42.44
		Federal Tax	10.61		10.61
17	63940	255 gal. 70-72	13.71		13.71
		807 gal. 3rd grade	36.32		36.32
		State Tax	42.48		42.48
		Federal Tax	10.62		10.62
17	63975	505 gal. 70-72	27.14		27.14
		558 gal. 3rd grade	25.11		25.11
		State Tax	53.15		53.15
		Federal Tax	10.63		10.63
19	64014	255 gal 70-72	13.71		13.71
		807 gal. 3rd grade	36.32		36.32

19	64052	State Tax	42.48	
		Federal Tax	10.62	103.13
		1060 gal. 3rd grade	47.70	
		State Tax	42.40	
		Federal Tax	10.60	100.70
20	459	Greases	9.75	9.75
20	64069	1065 gal. 3rd grade	47.93	
		State Tax	42.60	
		Federal Tax	10.65	101.18
Sept. 20	64099	255 gal. 70-72	13.71	
		807 gal. 3rd grade	36.32	
		State Tax	42.48	
		Federal Tax	10.62	103.13
23	64242	255 gal. 70-72	13.71	
		807 gal. 3rd grade	36.32	
		State Tax	42.48	
		Federal Tax	10.62	103.13
Oct. 17	542	Lube Oil	2.82	2.82

Date 1938	Invoice Number	Account		
		Debit	Credit	Balance
18	66048	1066 gal. 3rd grade	45.31	
		State Tax	42.64	
		Federal Tax	10.66	98.61
20	66116	259 gal. 70-72	13.27	
		819 gal. 3rd grade	34.81	
		State Tax	43.12	
		Federal Tax	10.78	101.98
20	550	Lube Oil	19.98	19.98
21	554	Lube Oil	19.98	19.98
21	66144	1074 gal. 3rd grade	42.96	
		State Tax	42.96	
		Federal Tax	10.74	96.66
22	66215	305 gal. 70-72	14.87	
		768 gal. 3rd grade	30.72	
		State Tax	42.72	
		Federal Tax	10.73	99.24
24	66274	509 gal. 70-72	24.81	
		562 gal. 3rd grade	22.48	

25	66317	State Tax	42.82	
		Federal Tax	10.71	100.84
		<hr/>		
		510 gal. 70-72	24.86	
		583 gal. 3rd grade	22.52	
		State Tax	53.65	
		Federal Tax	10.73	111.76
		<hr/>		
26	66357	258 gal. 70-72	12.58	
		815 gal. 3rd grade	32.60	
		State Tax	42.92	
		Federal Tax	10.73	98.83
		<hr/>		
27	65929	1069 gal. 3rd grade	41.42	
		State Tax	42.76	
		Federal Tax	10.69	94.87
		<hr/>		
28	66456	304 gal. 70-72	14.82	
		765 gal. 3rd grade	30.60	
		State Tax	42.76	
		Federal Tax	10.69	98.87
		<hr/>		
30	66529	812 gal. 70-72	39.59	
		257 gal. 3rd grade	10.28	

Date 1938	Invoice Number		Account		Balances
			Debit	Credit	
		State Tax	42.76		
		Federal Tax	10.69		
				103.32	
30	66530	1145 gal. 3rd grade	61.54		
		State Tax	45.80		
		Federal Tax	11.45		
			118.79		
31	65996	1066 gal. 3rd grade	41.31		
		State Tax	42.64		
		Federal Tax	10.66		
		55 Lube Oil	20.35		
			114.96		
Nov. 3	600	Lube Oil & Grease	11.52		
			11.52		
3	66714	511 gal. 70-72	24.91		
		564 gal. 3rd grade	22.56		
		State Tax	43.00		
		Federal Tax	10.75		
			101.22		
4	66754	511 gal. 70-72	24.91		
		564 gal. 3rd grade	22.56		
		State Tax	53.75		
		Federal Tax	10.75		
			111.97		

5	607	Lube Oil	5.64	5.64
5	66811	512 gal. 70-72	24.96	
		566 gal. 3rd grade	22.64	
		State Tax	43.12	
		Federal Tax	10.78	101.50
Sept. 24	64265	100 gal. 3rd grade	47.88	
		State Tax	42.56	
		Federal Tax	10.64	101.08
23	469	Lube Oil	2.82	2.82
26	64381	255 gal. 70-72	13.71	
		805 gal. 3rd grade	36.23	
		State Tax	42.40	
		Federal Tax	10.60	102.94
28	64485	301 gal. 70-72	16.18	
		758 gal. 3rd grade	34.11	
		State Tax	42.36	
		Federal Tax	10.59	103.24
29	64526	504 gal. 70-72	27.09	
		556 gal. 3rd grade	25.02	

Date 1988	Invoice Number		Account		Balance
			Debit	Credit	
29	489	State Tax	53.00		
		Federal Tax	10.60		
30	64592	Lube Oil & Grease	30.19		
		255 gal. 70-72	13.71		
		805 gal. 3rd grade	36.23		
		State Tax	42.40		
		Federal Tax	10.60		
Oct. 1	64624	255 gal. 70-72	13.71		
		804 gal. 3rd grade	36.18		
		State Tax	42.36		
		Federal Tax	10.59		
3	64680	303 gal. 70-72	16.29		
		761 gal. 3rd grade	34.25		
		State Tax	42.58		
		Federal Tax	10.64		
6	64816	255 gal. 70-72	13.07		
		806 gal. 3rd grade	34.26		
		State Tax	42.44		

8	513	Federal Tax	10.81	100.38
		Lube Oil	5.64	5.64
8	64897	302 gal. 70-72	15.48	
		761 gal. 3rd grade	32.34	
		State Tax	42.52	
		Federal Tax	10.63	100.97
10	64953	508 gal. 70-72	26.04	
		561 gal. 3rd grade	23.84	
		State Tax	42.76	
		Federal Tax	10.69	103.33
12	65035	256 gal. 70-72	13.12	
		899 gal. 3rd grade	34.38	
		Federal Tax	42.60	
		State Tax	10.65	100.75
12	522	Lube Oil	5.64	5.64
13	65075	506 gal. 70-72	25.93	
		599 gal. 3rd grade	23.76	
		Federal Tax	53.25	
		State Tax	10.65	113.59

Date	Invoice Number		Account Debit	Credit	Balance
1938					
15	65159	256 gal. 70-72	13.12		
		808 gal. 3rd grade	34.34		
		State Tax	42.56		
		Federal Tax	10.64		100.66
17	66012	255 gal. 70-72	13.07		
		807 gal. 3rd grade	34.30		
		State Tax	42.48		
		Federal Tax	10.62		100.47
Nov. 6	66824	1088 gal. 3rd grade	43.52		
		State Tax	43.52		
		Federal Tax	10.88		97.92
8	66885	260 gal. 70-72	12.68		
		823 gal. 3rd grade	32.92		
		State Tax	43.32		
		Federal Tax	10.83		99.75
10	66970	510 gal. 70-72	24.86		
		564 gal. 3rd grade	22.56		
		State Tax	42.96		
		Federal Tax	10.74		101.12

Date 1938	Invoice Number		Account Debit	Credit	Balance
13	67095	512 gal. 70-72		24.96	
		565 gal. 3rd grade		22.60	
		State Tax		43.08	
		Federal Tax	101.41	10.77	
13	634	Lube Oil	31.63		31.63
14	68248	1069 gal 3rd grade		41.42	
		State Tax		42.76	
		Federal Tax	94.87	10.69	
15	639	Lube Oil	20.72		20.72
15	67170	567 gal. 70-72		27.64	
		514 gal. 3rd grade		20.56	
		State Tax		43.24	
		Federal Tax	102.25	10.81	
16	67208	511 gal. 70-72		24.91	
		564 gal. 3rd grade		22.56	
		State Tax		53.75	
		Federal Tax	111.97	10.75	

Date 1938	Invoice Number		Account	Debit	Credit	Balance
18	646	Lube Oil		20.72		
18	67290	259 gal. 70-72		12.63		
		820 gal. 3rd grade		32.80		
		State Tax		43.16		
		Federal Tax		10.79		99.38
19	67357	307 gal. 70-72		14.97		
		772 gal. 3rd grade		30.88		
		State Tax		43.16		
		Federal Tax		10.79		99.80
21	68377	1069 gal. 3rd grade		41.42		
		State Tax		42.76		
		Federal Tax		10.69		94.87
25	67536	518 gal. 70-72		25.25		
		573 gal. 3rd grade		22.92		
		State Tax		43.64		
		Federal Tax		10.91		102.72
25	67561	1090 gal. 3rd grade		43.60		
		State Tax		43.60		

	Federal Tax	10.60	98.10
26	67586		
	517 gal. 70-72	25.20	
	571 gal. 3rd grade	22.84	
	State Tax	54.40	
	Federal Tax	10.88	113.32
27	67637		
	261 gal. 70-72	12.72	
	826 gal. 3rd grade	33.04	
	State Tax	43.48	
	Federal Tax	10.87	100.11
Dec. 1	67795		
	512 gal. 70-72	24.96	
	566 gal. 3rd grade	22.64	
	State Tax	43.12	
	Federal Tax	10.78	101.50
Dec. 1	685		
	Lube Oil	2.82	2.82
4	67884		
	260 gal. 70-72	12.68	
	822 gal. 3rd grade	32.88	
	State Tax	43.28	
	Federal Tax	10.82	99.66

Date 1938	Invoice Number	Account		Balance
		Debit	Credit	
4	67911	260 gal. 70-72	12.68	
		822 gal. 3rd grade	32.88	
		State Tax	43.28	
		Federal Tax	10.82	99.66
5	708	Lube Oil	11.28	11.28
5	67961	259 gal. 70-72	12.63	
		819 gal. 3rd grade	32.76	
		State Tax	43.12	
		Federal Tax	10.78	99.29
6	68666	1075 gal. 3rd grade	41.66	
		State Tax	43.00	
		Federal Tax	10.75	95.41
8	69821	558 gal. 70-72	27.69	
		515 gal. 3rd grade	20.60	
		State Tax	54.15	
		Federal Tax	10.83	113.27
10	69879	511 gal. 70-72	24.27	
		564 gal. 3rd grade	22.56	

12	729	State Tax	43.00	
		Federal Tax	10.75	100.58
		<hr/>	<hr/>	
		Lube Oil	20.35	20.35
12	69941	570 gal. 70-72	27.07	
		517 gal. 3rd grade	20.68	
		State Tax	43.48	
		Federal Tax	10.87	102.10
15	70048	261 gal. 70-72	12.40	
		825 gal. 3rd grade	33.00	
		State Tax	43.44	
		Federal Tax	10.86	99.70
16	70081	566 gal. 70-72	26.89	
		513 gal. 3rd grade	20.52	
		State Tax	53.95	
		Federal Tax	10.79	112.15
19	70158	308 gal. 70-72	14.25	
		774 gal. 3rd grade	30.96	
		State Tax	43.28	
		Federal Tax	10.82	99.31

Date 1938	Invoice Number	Account		
		Debit	Credit	Balance
20	70194	1087 gal. 3rd grade	43.48	
		State Tax	43.48	
		Federal Tax	10.87	97.83
23	70282	777 gal. 70-72	35.94	
		309 gal. 3rd grade	12.36	
		State Tax	43.44	
		Federal Tax	10.86	102.60
26	70351	1088 gal. 3rd grade	43.52	
		State Tax	43.52	
		Federal Tax	10.88	97.92
28	70423	308 gal. 70-72	14.25	
		776 gal. 3rd grade	31.04	
		State Tax	43.36	
		Federal Tax	10.84	99.49
31	72083	568 gal. 70-72	26.27	
		515 gal. 3rd grade	20.60	
		State Tax	54.15	
		Federal Tax	10.83	111.85

Date	Invoice Number	Description	Debit	Credit	Balance
1939 Jan. 2	72127	515 gal. 70-72	23.82		
		569 gal. 3rd grade	22.76		
		State Tax	43.36		
		Federal Tax	10.84		100.78
3	72194	1157 gal. 3rd grade	46.28		
		State Tax	46.28		
		Federal Tax	11.57		104.13
5	775	Lube Oil	5.64		5.64
5	72261	1160 gal. 70-72	53.65		
		State Tax	46.40		
		Federal Tax	11.60		111.65
7	69243	1153 gal. 3rd grade	44.68		
		State Tax	46.12		
		Federal Tax	11.53		102.33
10	71304	1078 gal. 3rd grade	37.73		
		State Tax	43.12		
		Federal Tax	10.78		91.63

Date 1939	Invoice Number		Account		Balance
			Debit	Credit	
12	791	Lube Oil	20.35		20.35
12	72475	569 gal. 70-72		24.89	
		515 gal. 3rd grade		18.67	
		State Tax		54.20	
		Federal Tax	108.60		
14	72537	261 gal. 70-72		11.42	
		825 gal. 3rd grade		29.91	
		State Tax		43.44	
		Federal Tax	95.63		
15	73075	820 Dist.		32.80	
		260 Kerosene		11.05	
18	72670	517 gal. 70-72		22.62	
		571 gal. 3rd grade		20.70	
		State Tax		43.52	
		Federal Tax	97.72		
18	804	Lube Oil		20.35	
19	73267	515 gal. 70-72		22.53	

23	72835	568 gal. 3rd grade	19.88	
		State Tax	43.32	
		Federal Tax	10.83	96.56
		<hr/>	<hr/>	
		569 gal. 70-72	24.89	
		515 gal. 3rd grade	18.67	
		State Tax	54.20	
		Federal Tax	10.84	108.60
27	72941	570 gal. 70-72	24.94	
		518 gal. 3rd grade	18.71	
		State Tax	43.44	
		Federal Tax	10.86	97.95
28	73459	1082 gal. 3rd grade	37.87	
		State Tax	43.22	
		Federal Tax	10.82	
		Lube Oil	5.64	97.61
31	73676	567 gal. 70-72	24.81	
		514 gal. 3rd grade	18.63	
		State Tax	43.24	
		Federal Tax	10.81	97.49

Date 1939	Invoice Number		Account		Balance
			Debit	Credit	
Feb. 31	836	Lube Oil	25.99		25.99
Feb. 2	73743	1085 gal. 3rd grade	39.33		39.33
		State Tax	43.40		43.40
		Federal Tax	10.85		10.85
Feb. 4	851	Lube Oil	8.46		8.46
4	73787	783 gal. 70-72	34.26		34.26
		311 gal. 3rd grade	11.27		11.27
		State Tax	54.70		54.70
		Federal Tax	10.94		10.94
5	73831	1162 gal. 3rd grade	42.12		42.12
		State Tax	46.48		46.48
		Federal Tax	11.62		11.62
6	73855	260 gal. 70-72	11.38		11.38
		823 gal. 3rd grade	29.83		29.83
		State Tax	43.32		43.32
		Federal Tax	10.83		10.83
8	73169	1083 gal. 3rd grade	37.91		37.91
		State Tax	43.32		43.32

10	74013	Federal Tax	10.83
		Lube Oil	26.70
			<u>118.76</u>
		264 gal. 70-72	11.55
		833 gal. 3rd grade	30.20
		State Tax	43.88
		Federal Tax	10.97
			<u>96.60</u>
11	74040	263 gal. 70-72	11.51
		830 gal. 3rd grade	30.09
		State Tax	43.72
		Federal Tax	10.93
			<u>96.25</u>
13	884	Lube Oil & Grease	27.79
13	74114	1163 gal. 3rd grade	42.16
		State Tax	46.52
		Federal Tax	11.63
			<u>100.31</u>
13	74133	261 gal. 70-72	11.42
		826 gal. 3rd grade	29.94
		State Tax	43.48
		Federal Tax	10.87
			<u>95.71</u>
15	74197	262 gal. 70-72	11.46

Date 1989	Invoice Number		Account		Balance
			Debit	Credit	
		827 gal. 3rd grade		29.98	
		State Tax		43.56	
		Federal Tax	95.89		
16	74233	1089 gal. 3rd grade		39.48	
		State Tax		43.56	
		Federal Tax	93.93		
15	889	Lube Oil	20.35		
17	74258	519 gal. 70-72		22.71	
		573 gal. 3rd grade		20.77	
		State Tax		43.88	
		Federal Tax	98.08		
20	74378	264 gal. 70-72		11.55	
		834 gal. 3rd grade		30.23	
		State Tax		43.92	
		Federal Tax	96.68		
20	895	Lube Oil	20.35		
21	75657	1083 gal. 3rd grade		37.91	
		State Tax		43.32	

22	74457	Federal Tax	10.83	92.06
		572 gal. 70-72	25.03	
		518 gal. 3rd grade	18.78	
		State Tax	54.50	
		Federal Tax	10.90	109.21
24	74531	517 gal. 70-72	22.62	
		570 gal. 3rd grade	20.66	
		State Tax	43.48	
		Federal Tax	10.87	97.63
Feb. 24	906	Lube Oil	9.88	9.88
28	74651	577 gal. 70-72	25.24	
		523 gal. 3rd grade	18.96	
		State Tax	44.00	
		Federal Tax	11.00	99.20
Mar. 2	74720	1092 gal. 3rd grade	39.62	
		State Tax	43.72	
		Federal Tax	10.93	94.27
2	923	Lube Oil	20.72	20.72

Date 1939	Invoice Number		Account		Balance
			Debit	Credit	
5	932	Lube Oil	5.64		5.64
4	74799	261 gal. 70-72	11.42		11.42
		826 gal. 3rd grade	29.94		29.94
		State Tax	43.48		43.48
		Federal Tax	10.87		10.87
5	74834	309 gal. 70-72	13.52		13.52
		777 gal. 3rd grade	28.17		28.17
		State Tax	43.44		43.44
		Federal Tax	10.86		10.86
6	74862	1086 gal. 3rd grade	39.37		39.37
		State Tax	43.44		43.44
		Federal Tax	10.86		10.86
8	74959	259 gal. 7072	11.33		11.33
		818 gal. 3rd grade	29.65		29.65
		State Tax	43.08		43.08
		Federal Tax	10.77		10.77
9	74984	259 gal. 70-72	11.33		11.33
		819 gal. 3rd grade	26.69		26.69
			95.71		95.71
			95.99		95.99
			93.67		93.67
			94.83		94.83

9	944	State Tax	43.12	
		Federal Tax	10.78	94.92
		Lube Oil	14.81	14.81
11	75051	1078 gal. 3rd grade	39.08	
		State Tax	43.12	
		Federal Tax	10.78	92.98
12	76054	1069 gal. 3rd grade	37.42	
		55 Naphtha	3.85	
		State Tax on gas	42.76	
		Federal Tax	11.24	95.27
13	75130	259 gal. 70-72	11.33	
		819 gal. 3rd grade	29.69	
		State Tax	43.12	
		Federal Tax	10.78	94.92
15	75203	260 gal. 70-72	11.70	
		822 gal. 3rd grade	30.83	
		State Tax	43.28	
		Federal Tax	10.82	96.63

Date 1939	Invoice Number		Account		Balance
			Debit	Credit	
16	977	Lube Oil	43.97		
					43.97
16	75265	1079 gal. 3rd grade	40.46		
		State Tax	43.16		
		Federal Tax	10.79		
					94.41
16	75273	260 gal. 70-72	11.70		
		821 gal. 3rd grade	30.79		
		State Tax	43.24		
		Federal Tax	10.81		
					96.54
Mar. 17	75281	1157 gal. 3rd grade	59.30		
		State Tax	46.28		
		Federal Tax	11.57		
					117.15
17	75304	773 gal. 70-72	34.79		
		307 gal. 3rd grade	11.51		
		State Tax	54.00		
		Federal Tax	10.80		
					111.10
19	76221	1069 gal. 3rd grade	38.75		
		State Tax	42.76		
		Federal Tax	10.69		
					92.20

20	77209	1152 gal. 3rd grade	59.04
		State Tax	46.08
		Federal Tax	11.52
			116.64
20	77214	511 gal. 70-72	23.00
		564 gal. 3rd grade	21.15
		State Tax	43.00
		Federal Tax	10.75
			97.90
21	77260	1150 3rd grade	58.94
		State Tax	46.00
		Federal Tax	11.50
			11.50
23	76317	10 gal. 70-72	1.10
		State Tax .....	.40
		Federal Tax .....	.10
		1069 Diesel Fuel	40.09
			41.69
25	1003	Lube Oil	29.13
25	77432	508 gal. 70-72	22.86
		561 gal. 3rd grade	21.74
		State Tax	42.76
		Federal Tax	10.69
			98.05

Date 1939	Invoice Number		Account		Balance
			Debit	Credit	
28	77533	826 gal. 70-72		38.20	
		261 gal. 3rd grade		10.11	
		State Tax		43.48	
		Federal Tax	102.66	10.87	
30	77607	1085 gal. 3rd grade		42.01	
		State Tax		43.40	
		Federal Tax	96.29	10.85	
31	77641	1156 gal. 3rd grade		60.69	
		State Tax		46.24	
		Federal Tax	118.49	11.56	
30	1014	Lube Oil	19.25	19.25	
Apr. 3	1029	Lube Oil	19.25	19.25	
3	77738	1073 gal. 3rd grade		41.58	
		State Tax		42.92	
		Federal Tax	95.23	10.73	
4	1039	Lube Oil	14.10	14.10	
4	77776	1074 gal. 3rd grade		41.62	

	State Tax	42.96
	Federal Tax	10.74
		95.32
7	77865	
	516 gal. 70-72	23.87
	570 gal. 3rd grade	22.09
	State Tax	43.44
	Federal Tax	10.86
		100.26
10	77956	
	1075 gal. 3rd grade	41.66
	State Tax	43.00
	Federal Tax	10.75
		95.41
10	1059	
	Lube Oil	18.90
Apr. 11	7661	
	10 gal. 70-72	1.20
	State Tax .....	.40
	Federal Tax .....	.10
	1069 gal. Diesel Fuel	40.09
		41.79
12	78045	
	308 gal. 70-72	14.25
	774 gal. 3rd grade	29.99
	State Tax	43.28
	Federal Tax	10.82
		98.34

Date 1938	Invoice Number		Lube Oil	Account	
				Debit	Credit
12	1069			19.43	
13	78096				
			Lube Oil	19.43	
			512 gal. 70-72	23.68	
			566 gal. 3rd grade	21.93	
			State Tax	43.12	
			Federal Tax	10.78	
14	78119				
			1075 gal. 3rd grade	41.66	
			State Tax	43.00	
			Federal Tax	10.75	
13	1071				
			Lube Oil	38.85	
14	1073				
			Lube Oil	47.85	
1938					
Dec. 13			CV-12-11 Loss on Truck for Mo.	4.40	
Payments					
1938					
June 27			Cr 6-282		251.00
July 6			Cr 7-46		450.00

7	Cr	7-55	.....	350.00
8	Cr	7-75	.....	250.00
11	Cr	7-94	.....	554.24
16	Cr	7-154	.....	1,000.00
16	Cr	7-168	.....	600.00
18	Cr	7-175	.....	300.00
21	Cr	7-233	.....	300.00
25	Cr	7-262	.....	200.00
27	Cr	7-283	.....	500.00
30	Cr	7-317	.....	502.67
Aug. 4	Cr	8-43	.....	1,000.00
8	Cr	8-67	.....	300.00
13	Cr	8-122	.....	300.00
15	Cr	8-134	.....	300.00
17	Cr	8-163	.....	32.89
19	Cr	8-180	.....	100.00
20	Cr	8-188	.....	300.00
23	Cr	8-218	.....	200.00
30	Cr	8-293	.....	500.00
Sept. 7	Cr	9-58	.....	200.00
10	Cr	9-94	.....	200.00
15	Cr	9-146	.....	300.00

Date 1939	Invoice Number	Account		Balance
		Debit	Credit	
16	Cr 9-156		197.28	
19	Cr 9-189		500.00	
22	Cr 9-228		400.00	
27	Cr 9-273		600.00	
30	Cr 9-310		300.00	
Oct.	5	Cr 10-41	300.00	
	11	Cr 10-57	300.00	
	18	Cr 10-93	300.00	
	18	Cr 10-93	161.27	
	18	Cr 10-93	4.45	
Oct.	25	Cr 10-99	400.00	
	29	Cr 10-103	500.00	
	1	Cr 11-1	300.00	
Nov.	6	Cr 11-6	300.00	
	9	Cr 11-8	300.00	
	17	Cr 11-15	15.47	
Dec.	19	Cr 11-17	500.00	
	26	Cr 11-22	500.00	
	27	Cr 11-24	300.00	
	6	67975	83.98	
	16	Cr 12-14	500.00	

20	Cr 12-17	400.00
28	Cr 12-23	400.00
1939		
Jan. 4	Cr 1-2	300.00
13	Cr 1-10	300.00
17	Cr 1-13	200.00
23	Cr 1-18	200.00
27	Cr 1-22	300.00
Feb. 1	Cr 2-1	200.00
7	Cr 2-6	300.00
7	Cr 2-6	5.08
14	Cr 2-12	400.00
20	Cr 2-17	200.00
24	Cr 2-21	200.00
27	Cr 2-23	200.00
Mar. 15	Cr 3-13	200.00
17	Cr 3-15	300.00
20	Cr 3-17	300.00
28	Cr 3-24	300.00
Apr. 11	Cr 4-9	200.00
13	Cr 4-11 Earnings on Truck	17.91
	Totals	26,066.66
		20,676.24
		5,390.42

State of Texas,
County of Potter.

Before me, the undersigned authority, on this day personally appeared Ray Woolf, who first being placed under oath deposes and says, that he is an agent of The Shamrock Oil and Gas Corporation and that he holds the office of Credit Manager for said company and that the above and foregoing cause of action and account in favor of The Shamrock Oil and Gas Corporation and against G. Obie Sheets and Chester Sheets forming the partnership of and doing business as Friona Independent Oil Company, is within the knowledge of affiant just and true, and that it is due and that all just and lawful offsets, payments and credits have been allowed.

RAY WOOLF.

Subscribed And Sworn to before me this 11 day of May, 1939.

(Seal)

MARGUERITE SEOGGAN,
Notary Public, Potter County,
Texas.

Indorsements: No. 14531, No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets et al.

Filed: 5-11-39 Ben Smith, District Clerk, Potter Co., Texas.

Filed: 7-1-39 E. V. Rushing, District Clerk, Parmer County, Texas.

23

DEFENDANT'S PLEA OF PRIVILEGE.

Filed 6-24-39, 7-1-39.

In the District Court, 108th Judicial District, Potter County,
Texas.

The Shamrock Oil & Gas Corporation,

vs.

No. 14531.

G. Obie Sheets, et al.

To the Honorable W. E. Gee, Judge of said Court:

Now comes G. Obie Sheets and Chester Sheets, defendants in the above entitled and numbered cause, having been heretofore served with citation to appear herein, and file this their plea of privilege, showing to the Court as grounds therefor the following:

1. These defendants, the parties claiming such privilege, were not at the institution of such suit, nor at the time of the service of process thereon, nor were, nor are, they at the time of the filing of such plea, residents of Potter County, Texas, the County in which such suit was instituted.

2. The county of the residence of these defendants at the time of such plea, including the time of the filing of same, is Parmer County, Texas.

3. No exception to exclusive venue in the county of one's residence, provided by law, exists in said cause.

Wherefore, premises considered, these defendants pray the Court to sustain this plea of privilege.

**G. OBIE SHEETS and CHESTER
SHEETS,**

Defendants.

MONNING & SINGLETON,

Their Attorneys.

BEN P. MONNING.

The State of Texas,
County of Potter.

Before Me, the undersigned authority, on this day personally appeared Ben P. Monning, who, on oath stated that he is one of the attorneys, of record for the defendants in the above mentioned cause and that the foregoing plea and every statement and allegation thereof are true.

BEN P. MONNING.

24 Subscribed And Sworn To, before me, by the said Ben P. Monning, this the 23rd day of June A. D. 1939, to certify which witness my hand and seal of office.

MRS. J. E. BROWNING,

A Notary Public in and for
Potter County, Texas.

(Seal)

Indorsements: No. 14531, No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets, et al.

Filed: 6-24-39; Ben Smith, District Clerk, Potter County, Texas.

Filed: 7-1-39; E. V. Rushing, Clerk, District Court Parmer County, Texas.

**CERTIFIED COPY OF ORDER SUSTAINING PLEA OF
PRIVILEGE.**

Filed 7-1-39.

In the District Court of Potter County, Texas, 108th
Judicial District.

The Shamrock Oil and Gas Corporation,

vs.

No. 14531.

G. Obie Sheets, et al.

On this the 29th day of June, 1939, in the above entitled and numbered cause, came on to be heard the Plea of

Privilege of G. Obie Sheets and Chester Sheets in the above cause and came the plaintiff, by its attorney, and announced that it would not controvert such Plea of Privilege of the said G. Obie Sheets and Chester Sheets to be sued in Parmer County, the County of said defendant's residence, and the Court, having considered such Plea of Privilege, together with the evidence offered, is of the opinion that the Plea of Privilege should be sustained.

It Is Accordingly Ordered, Adjudged And Decreed that such Plea of Privilege is sustained, that the venue of said cause is changed, and that said cause should be transferred to the District Court of Parmer County, Texas, the proper Court of the County having jurisdiction of the parties to such cause, of the person of the defendants, G. Obie Sheets and Chester Sheets, and of such cause; and the Clerk of this Court is ordered to make up a transcript of all of the orders in said cause, certifying thereto official-
 25 ly under the seal of this Court, and transmit the same, together with the original papers in said cause, to the Clerk of the said District Court of Parmer County, Texas, and that the plaintiff pay the costs incurred in this cause prior to the time same is filed in the said District Court of Parmer County, Texas, for which let execution issue.

(Signed) W. E. GEE,
 District Judge.

The State of Texas,
 County of Potter.

I, Ben Smith, Clerk of the District Courts of Potter County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order Sustaining Plea of Privilege in Cause No. 14531 wherein The Shamrock Oil & Gas Corporation is plaintiff and G. Obie Sheets, et al are defendants, as the same appears of record in my office in Civil Minute Book No. 22 at page 527, and is a complete transcript of all orders entered in said cause.

Given Under My Hand And The Seal Of Said Court at my office in Amarillo, Texas, this the 30th day of June, A. D. 1939.

(Seal) BEN SMITH,
Clerk District Courts, Potter
County, Texas.
By RUTH ROBINSON,
Deputy.

Indorsements: No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets et al.

Filed: 7-1-39; E. V. Rushing, Clerk of the District Court Parmer County, Texas.

26 DEFENDANT'S ORIGINAL ANSWER.

Filed 7-7-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil & Gas Corporation,

vs.

No. 1159.

G. Obie Sheets, et al.

To Said Honorable Court:

Now come G. Obie Sheets and Chester Sheets, defendants in the above entitled and numbered cause, and file this their Original Answer to Plaintiff's Original Petition filed herein, and for said answer say:

I.

This defendants except and demur generally to plaintiff's said petition and say that the same is not sufficient

in law to require them to answer, states no cause of action against them, or either of them, and should be dismissed, and of this they pray judgment of the Court.

II.

And, for answer herein, if such be necessary, without waiving their general demurrer but still insisting upon the same, these defendants deny each and every allegation in plaintiff's said petition contained and say that the same is not true in whole or in part and demand strict proof of the same, and of this they put themselves upon the country.

III.

That on or about the 1st day of February, 1937, and anterior to the dates of the shipments of gasoline set forth in plaintiff's petition, Plaintiff entered into an agreement with the defendants, and each of them, whereby defendants agreed to be bound by the price at which they in turn were to sell the gasoline to the consuming public, at retail, and further agreed to handle the plaintiff's gasoline exclusively; plaintiff agreed with defendants in conspiracy against trade in violation of Article 7428 of the Revised Civil Statutes of the State of Texas, whereby the defendants became bound to sell the gasoline product of plaintiff exclusively; and defendants further agreed and were caused to agree to refuse to buy any other gasoline or to sell any other gasoline out of their pumps other than the gasoline of plaintiff, and all of which agreements amounted to a conspiracy against trade, and the sales referred to in plaintiff's petition were sales in a continuation and carrying out of said contract of conspiracy against trade, which was in all things illegal and void.

Wherefore, defendants pray that they go hence with their costs, without day, and that plaintiff take nothing.

IV.

On or about the 1st day of February, 1937, and on numerous occasions since said date, plaintiff required defendants to again agree with it with reference to the retail price of gasoline, and by which agreement defendants agreed to be guided by plaintiff's designated price, and that such contract for sale of gasoline was in violation of the anti-trust statutes and was a conspiracy against trade, and the contract of sale of gasoline to defendants was one whereby defendants agreed to allow plaintiff to fix the amounts increase or reduce the price of the merchandise and was designed to fix a standard price, which is in restraint of trade and in contravention with the anti-trust statutes, Art. 7426, et seq. of the Revised Civil Statutes of the State of Texas, and that the purchase and account complained of in plaintiff's petition were articles passing from plaintiff to defendants under the terms of said illegal contract in restraint of trade and in violation of the anti-trust statutes, and that such contract was illegal and void.

Wherefore, defendants pray that they go hence with their costs, without day, and that plaintiff take nothing.

V.

On or about the 1st day of February, 1937, and at various dates anterior to such time, plaintiff directed the defendants, and each of them, to comply with the regulated major oil companies' price for gasoline and to fluctuate their price such that the price of gasoline should never be under the quoted major oil companies' price at any time; that the defendants, and each of them, were required to comply with plaintiff's demands, and so set their retail price in conformity with plain-

tiff's demands, such that the price of gasoline supplied by plaintiff to defendants was to be equal with the major oil companies' price, and in furtherance of a monopoly, as such term is defined in Art. 7227 of the Revised Civil Statutes of the State of Texas, and which contract, by reason of being a monopoly and in furtherance of a monopoly, was illegal and void. That the items listed in plaintiff's claim were a result of said illegal contract and in pursuance thereof, and were an intrical part of the furtherance of a monopoly, and that said contract for the purchase therefor was illegal and void.

Wherefore, defendants pray that they go hence with their costs, without day, and that the plaintiff take nothing.

VI.

And, by way of cross-action and as an off-set defendants and cross plaintiffs further say:

On or about the 1st day of February, 1939, plaintiff entered into an agreement with the defendants, and each of them, whereby the defendants were to purchase newer and improved equipment for the transportation of gasoline, and were, in turn, to lease said truck by hauling Shamrock gasoline from Shamrock plants to the various retail establishments created by the plaintiff herein, and were to use said truck and to have the depreciation, up-keep, and cost of operation of said truck paid by the plaintiff and to continue the operation of hauling for plaintiff herein until the sum of \$5,000.00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set to defendant's account; that immediately thereafter, to induce the defendants, and each of them to expend their funds for such gasoline truck and transportation equipment, and to cause them to enter into such contract with plaintiff for hauling of such gaso-

line, plaintiff agreed to allow defendants to continue to operate at least one truck in such manner, whereby plaintiff was obligated to pay the salary of the driver, the cost of operation, depreciation, and up-keep and to yield a sum of approximately \$300.00 monthly to the defendants, and that said contract should continue indefinitely, as long as defendants desired to continue making said hauls; that although defendants placed themselves in a position to make such hauls and commenced making such hauls, soon thereafter plaintiff refused to allow defendants to haul its gasoline, and soon thereafter concluded its sale of gasoline to these defendants.

Wherefore, defendants, and each of them, have been damaged in the sum of \$5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of \$2,200.00, for which defendants pray by way of cross-action against the plaintiff herein.

Wherefore, premises considered, defendants pray judgment of the Court, that on final hearing hereof plaintiff take nothing and that they go hence without day, with their cost, and that they have judgment against the said plaintiff on their cross-action for \$7200.00, and for all costs of suit, and such other and further relief, special and general, in law and in equity, to which they may be justly entitled.

MONNING & SINGLETON,
Attorneys for Defendants.

Indorsements: No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets, et al.

Filed: 7-7-39: E. V. Rushing, District Clerk, Parmer County, Texas.

**PETITION FOR REMOVAL OF CAUSE TO UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS, AMARILLO DIVISION.**

30 Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil and Gas Corporation,

vs. No. 1159.

G. Obie Sheets and Chester Sheets.

To the District Court for the 68th Judicial District of
Texas, for the County of Parmer, Texas:

The petition of The Shamrock Oil and Gas Corporation, defendant in the cross action of G. Obie Sheets and Chester Sheets in the above entitled cause respectfully shows to this Court that in the above entitled and numbered cause G. Obie Sheets and Chester Sheets have brought a cross action against The Shamrock Oil and Gas Corporation, and that such cross action is a suit in which The Shamrock Oil and Gas Corporation is defendant, and that said suit is now pending herein, and that said cross action presents an action entirely separate, segregated and not related to the action or claims made in the action filed by The Shamrock Oil and Gas Corporation against the said G. Obie Sheets and Chester Sheets.

That said cross action is a suit or action of a civil nature at law, and is brought to recover the sum of Seven Thousand Two Hundred Dollars (\$7,200.00) damages against the defendant in the cross action, The Shamrock Oil and Gas Corporation.

The cross action of the said G. Obie Sheets and Chester Sheets in the above entitled action involves a controversy which is wholly between citizens of different states, in

that G. Obie Sheets and Chester Sheets, the plaintiffs in the cross action, were at the time of the commencement of said suit in this Court, and at the time of filing such cross action, and still are citizens of the State of
 31 Texas, residing in the County of Parmer in said State; and that your petitioner, The Shamrock Oil and Gas Corporation, the defendant in said suit of cross action, was at the time of the commencement of said suit, and still is, a corporation duly created and existing under and by virtue of the laws of the State of Delaware, and is a resident and citizen of the State of Delaware, but maintaining an office and place of business in Amarillo, Potter County, Texas, in the Northern District of Texas.

That said suit on cross action is one of which the District Courts of the United States are given original jurisdiction.

The time within which your petitioner is required by the laws of this State and the rules of this Court to answer or plead to the cross action of the said G. Obie Sheets and Chester Sheets in the above entitled action has not yet expired.

The value of the matter in controversy in said action exceeds Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, as appears from the allegations of the cross action.

Petitioner presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Northern District of Texas, Amarillo Division, within thirty (30) days from the date of filing of this petition, a certified copy of the record in this suit, and that it will pay all costs that may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

Prior to the filing of this petition and of said bond for the removal of this cause, written notice of intention to file same was given by petitioner to the plaintiffs in such cross action as required by law, a true copy of which, with proof of service of same, is attached hereto.

Wherefore, your petitioner prays that this Court proceed no further herein except to make an order of removal as required by law and to accept said surety and bond, and to cause the record herein to be removed into said District Court of the United States within
32 and for the Northern District of Texas, Amarillo Division, according to the statutes in such cases made and provided.

Dated July 10th, 1939.

UNDERWOOD, JOHNSON,
DOOLEY & WILSON,
By W. M. SUTTON,
Attorneys for Petitioner The
Shamrock Oil and Gas
Corporation.

PETITION FOR REMOVAL OF CAUSE TO UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS, AMARILLO DIVISION.

Filed 7-10-39.

State of Texas,
County of Potter.

J. H. Dunn, being duly sworn deposes and says:

That he is Vice-President and General Manager of The Shamrock Oil and Gas Corporation, and that he is auth-

orized to make this affidavit for and on behalf of The Shamrock Oil and Gas Corporation, and that he has read the above and foregoing petition and is familiar with all matters of fact therein alleged and set forth, and that all of such matters, facts and things therein alleged and set out are within the knowledge of the affiant true and correct, except as to such matters alleged upon information and belief, and affiant states that said matters, facts and things so alleged upon information and belief are within the belief of affiant true and correct.

J. H. DUNN.

Sworn To And Subscribed before me, the undersigned authority, this the 10th day of July, 1939.

MARGUERITE SCOGGAN,

(Seal)

Notary Public, Potter County,
Texas.

PETITION FOR REMOVAL OF CAUSE TO UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS, AMARILLO DIVISION.

33

Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shammock Oil and Gas Corporation,

vs.

No. 1159.

G. Obie Sheets and Chester Sheets.

To G. Obie Sheets and Chester Sheets, Plaintiffs in Cross
Action in above Entitled Cause, and their Attorneys,
Monning and Singleton:

Please take notice that The Shamrock Oil and Gas Corporation, the defendant in the cross action is the above entitled cause, will, on the 10th day of July, 1939, at one

o'clock in the afternoon of that day, file in the District Court of the State of Texas, for the County of Parmer in said State, and in the Clerk's office thereof in which said suit is now pending, its petition and bond for the removal of the said Cause from the said District Court of Parmer County, Texas, to the District Court of the United States for the Northern District of Texas, Amarillo Division, and that on the 10th day of July, 1939, at one o'clock in the afternoon of that day or as soon thereafter as counsel may be heard, said petition and bond will be called up for hearing and disposed of before the Court in which this action is pending, at which time and place you may be present if you so elect copies of said petition are served herewith.

Dated this the 10th day of July, 1939.

THE SHAMROCK OIL AND
GAS CORPORATION,
By UNDERWOOD, JOHNSON,
DOOLEY & WILSON,
Its Attorneys.

Service of the above notice and receipt of copy thereof and copy of the removal petition and bond attached is acknowledged to have been made on the undersigned attorneys for G. Obie Sheets and Chester Sheets, plaintiffs in cross action, on the 10th day of July, 1939, and before the hearing above stated.

MONNING & SINGLETON,
E. BYRON SINGLETON,
Attorneys for Plaintiffs.

Indorsements: No. 1159, The Shamrock Oil and Gas Corporation vs. G. Obie Sheets and Chester Sheets.

Filed: 7-10-39, E. V. Rushing, District Court, Parmer County, Texas.

Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil and Gas Corporation,

vs.

No. 1159.

G. Obie Sheets and Chester Sheets.

Know All Men By These Presents: That, we, The Shamrock Oil and Gas Corporation, as principal, and American Surety Company of New York, as Surety, are held and firmly bound unto G. Obie Sheets and Chester Sheets, the plaintiffs in the cross action against The Shamrock Oil and Gas Corporation in the above entitled and numbered cause, their successors and assigns, in the penal sum of Five Hundred Dollars (\$500.00) lawful money of the United States of America for the payment of which well and truly to be made we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

The conditions of this obligations are that whereas, the said The Shamrock Oil and Gas Corporation has applied by petition to the District Court of the County of Parmer and State of Texas for the removal of the above entitled cause from the said District Court of Parmer County, Texas, to the District Court of the United States for the Northern District of Texas, Amarillo Division;

Now, if the said The Shamrock Oil and Gas Corporation shall enter, in the said District Court of the United States for the Northern District of Texas, Amarillo Division, within thirty (30) days from the date of filing of the petition for such removal a certified copy of the record in said suit, and shall well and truly pay all costs that may

be awarded by said District Court if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation is to be void, otherwise to remain in full force and effect.

**THE SHAMROCK OIL AND
GAS CORPORATION,**

By J. H. DUNN,

Its Vice President and General
Manager, Principal.

**AMERICAN SURETY COM-
PANY OF NEW YORK,**

By HENRY THOMAS,

Its Attorney-in-fact, Surety.

35

(Corp. Seal)

Approved and Accepted this 10th day of July, 1939.

REESE TATUM,

Judge of the District Court of
Parmer County, Texas.

Indorsements: No. 1159; The Shamrock Oil and Gas Corporation vs. G. Obie Sheets and Chester Sheets.

Filed: 7-10-39; E. V. Rushing, Clerk of the District Court, Parmer County, Texas.

ORDER REMOVING CASE TO FEDERAL COURT.

Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil and Gas Corporation,

vs.

No. 1159.

G. Obie Sheets and Chester Sheets.

On this the 10th day of July, 1939, The Shamrock Oil and Gas Corporation, defendant in the cross action in the above cause, through its attorneys, presented herein its petition for removal of this cause to the District Court of the

United States for the Northern District of Texas, Amarillo Division, and also presented its bond conditioned as provided by law, and likewise presented due proof of service of written notice of said petition and bond for removal on which, It Is, Therefore, Ordered, Adjudged And Decreed by the Court that the said petition and bond be filed, as now done, and that said bond be and the same is hereby accepted and approved, and that this Court proceed no further herein, said cause being removed to the District Court of the United States for the Northern District of Texas Amarillo Division thereof, by virtue of said petition and bond, and that the Clerk of this Court prepare proper removal transcript herein as provided by law.

REESE TATUM,

Judge of the District Court,
Parmer County, Texas, 68th
Judicial District of Texas.

36 Indorsements: No. 1159, The Shamrock Oil
and Gas Corporation vs. G. Obie Sheets et al.

Filed: 7-10-39, E. V. Rushing, District Clerk, Parmer
County, Texas.

DEFENDANT'S MOTION TO REMAND CAUSE.

37 Filed Aug. 9, 1939.

In the District Court of the United States for the Northern
District of Texas, Amarillo Division.

The Shamrock Oil and Gas Corporation,
vs. No. 73 Civil Action.
G. Obie Sheets and Chester Sheets.

To the Honorable James C. Wilson, United States District
Judge:

Now come G. Obie Sheets and Chester Sheets, defend-
ants in the original cause of action and cross plaintiffs, and

move the Court to remand the above entitled cause to the State Court from whence it was removed for trial, for the following reasons:

I.

The original suit was instituted by the Shamrock Oil and Gas Corporation as plaintiff against G. Obie Sheets and Chester Sheets as defendants, and the original suit filed on behalf of The Shamrock Oil and Gas Corporation prayed for a judgment in the sum of \$5,390.42, and being a sum in excess of \$3,000.00. The Shamrock Oil and Gas Corporation had its election prior to filing the original suit, and although the original claim was in an amount in excess of \$3,000.00 and a diversity of citizenship appeared, the Shamrock Oil and Gas Corporation elected the forum of the State Court by instituting such proceedings in the District Court of Potter County, Texas, and The Shamrock Oil and Gas Corporation is bound by its election to try the cause in the forum of the State District Court.

II.

38 The Shamrock Oil and Gas Corporation is not an original defendant and relies in its petition for removal of this cause upon a cross-action wherein it is cross defendant. The Shamrock Oil and Gas Corporation is not such a defendant as is entitled to remove this cause from the State Court.

III.

There is involved in this cross-action no separable controversy and the basis of the cross-action grew out of and is dependent upon the allegations contained in The Shamrock Oil and Gas Corporation's original petition, and the identical defendants in the main suit are the cross-plaintiffs against the identical plaintiff.

IV.

The cross-petition, wherein The Shamrock Oil and Gas Corporation is cross-defendant, is not such an action in which the District Courts of the United States are given original jurisdiction; the cross-action is a suit or action of a civil nature at law, brought to recover the sum of \$2,200.00 damages against the cross-defendant in the cross-action The Shamrock Oil and Gas Corporation, and is further brought by way of set-off for the sum of \$5,000.00 and is urged defensively as a set-off in the sum of \$5,000.00, and does not pray for affirmative relief in a sum in excess of \$3,000.00.

V.

All of the facts alleged herein are apparent in the record in said cause, which said record evidences:

(a) The Shamrock Oil and Gas Corporation filed its suit in the 108th Judicial District Court of Potter County, Texas, being Cause No. 14,531, complaining of G. Obie Sheets and Chester Sheets, forming the partnership and doing business as and in the name of Friona Independent Oil Company, and presented its claim upon a verified itemized statement of account, praying judgment against the defendants in the sum of \$5,390.42;

39 (b) Defendants G. Obie Sheets and Chester Sheets filed their plea of privilege under Article 1995 of the 1925 Revised Civil Statutes of the State of Texas, praying that said cause be transferred to Parmer County, Texas, the place of their residence, and upon this plea of privilege the cause was transferred to Parmer County, Texas;

(c) G. Obie Sheets and Chester Sheets filed their original answer in the District Court of Parmer County,

Texas, urging general and specific denials and by way of cross-action and as an off-set G. Obie Sheets and Chester Sheets complained of the original plaintiff the Shamrock Oil and Gas Corporation and prayed for an allowance of \$5,000.00 as a set-off to any claim which it may have, and prayed affirmatively for the further sum of \$2,200.00 by way of cross-action against The Shamrock Oil and Gas Corporation;

(d) The Shamrock Oil and Gas Corporation filed its petition for removal of the cause to the United States District Court for the Northern District of Texas, Amarillo Division, upon the allegations:

1. Said Cross-action presents an action entirely separate, segregated and not related to the action or claims made in the action filed by The Shamrock Oil and Gas Corporation;
2. Said cross-action is brought to recover the sum of \$7,200.00 damages;
3. Diversity of citizenship;
4. Said suit on cross-action is one in which the District Court of the United States is given original jurisdiction;
5. The petition was filed in time required by law;
6. The value of the matter in controversy exceeds \$3,000.00;
- 40 7. The required bond submitted; and,
8. Notice given to adverse counsel;

and come now your movants G. Obie Sheets and Chester Sheets and deny paragraphs 1, 2, 4 and 6, and admit the allegations in paragraphs 3, 5, 7 and 8.

Wherefore your movants G. Obie Sheets and Chester Sheets, cross-plaintiffs and original defendants herein, say this Court has no jurisdiction to try and determine this cause, and pray that same be remanded to the 69th Judicial District Court, Parmer County, Texas, from whence it came.

E. BYRON SINGLETON,

Of Counsel.

MONNING & SINGLETON,

Attorneys for G. Obie Sheets
and Chester Sheets.

1014 Fisk Building,
Amarillo, Texas.

ORDER OVERRULING MOTION TO REMAND.

41

Filed Sept. 25, 1939.

(Title Omitted.)

On this the 25th day of September, 1939, came on to be considered the motion of G. Obie Sheets and Chester Sheets to remand this cause to the District Court of the State of Texas for Parmer County, and came the plaintiffs in the cross action, G. Obie Sheets and Chester Sheets, by their attorneys, and came the defendant in the cross action, The Shamrock Oil and Gas Corporation, by its attorneys, and announced upon said motion, and after hearing said motion, argument of counsel, and due consideration thereof, the Court is of the opinion and finds that said motion to remand should be overruled.

Therefore, it is Ordered, Adjudged and Decreed that the motion of G. Obie Sheets and Chester Sheets to remand this cause to the District Court of the State of Texas for

Parmer County be, and the same is hereby, overruled and refused for each and all of the reasons assigned in opinion rendered in open Court this the 25th day of September, 1939, which opinion is filed herein, to all of which action and ruling of the Court the plaintiffs in cross action, G. Obie Sheets and Chester Sheets, excepted.

JAMES C. WILSON,
District Judge.

42

JUDGMENT.

Filed Oct. 13, 1939.

In the United States District Court for the Northern
District of Texas, Amarillo Division.

The Shamrock Oil and Gas Corporation, Complainant,
vs.

G. Obie Sheets, et al., Defendants.

Civil Action Number 73.

Be It Remembered that upon the 11th day of October, 1939, the above case came on for trial, whereupon came the complainant and announced ready, and came the defendants and announced ready upon complainant's action and further announced ready upon defendants' cross-action and counterclaim, whereupon complainant announced ready upon the cross-action and counterclaim of defendants, a jury was thereupon selected composed of E. C. Eubanks and eleven others, whereupon the evidence of respective parties was introduced and at the conclusion of the evidence the complainant, The Shamrock Oil and Gas Corporation, made a motion for an instructed verdict in its favor upon its claim and the cross-action and counterclaim of the defendants, the Court being of the opinion

that under the evidence introduced upon the trial of this cause that the plaintiff was entitled to an instructed verdict upon the cross-action and counterclaim of the defendants and was further of the opinion that there should be submitted to the jury one issue of fact raised by the pleadings and evidence, whereupon, after argument of counsel for respective parties to the jury, the Court submitted in its charge to the jury the following issue:

43 "Did the parties to this suit, in the contract, out of which the account in question resulted, agree that the defendants were to sell the products plaintiff sold to them only at those prices at which the major oil companies sold like products in Friona, Texas?"

Whereupon the jury retired to deliberate and consider its answer to such issue and thereafter on the 13th day of October, 1939, returned in open Court their answer to such issue as follows:

"We, the jury, answer No.

E. C. EUBANKS, Foreman."

Whereupon the Court instructed the jury to return its verdict for the plaintiff upon the plaintiff's claim and upon the cross-action and counterclaim of the defendant and, pursuant to the instructions of the Court, the jury returned the following verdict:

"We, the jury, find for the plaintiff, The Shamrock Oil and Gas Corporation, against the defendants, G. Obie Sheets and Chester Sheets, doing business as and in the name of Friona Independent Oil Company, on the plaintiff's claim for the sum of \$5,390.42 with interest at the rate of 6% per annum from May 14, 1939.

We, the jury, find for the plaintiff, The Shamrock Oil and Gas Corporation, on the cross-action and counterclaim of defendants.

E. C. EUBANKS, Foreman."

Therefore, it is Ordered, Adjudged and Decreed that the plaintiff, The Shamrock Oil and Gas Corporation, to have and recover judgment of and against the defendants, G. Obie Sheets and Chester Sheets, jointly and severally, and as partners, doing business as and in the name of Friona Independent Oil Company, for the amount of \$5,390.42, with interest at the rate of 6% per annum from the 14th day of May, 1939, to this date, in the total sum of \$5,524.28, and that this judgment shall bear interest from this date at the rate of 6% per annum.

44 It is Further Ordered, Adjudged and Decreed that the defendants take nothing by their cross-action and counterclaim against the plaintiff.

It is Further Ordered, Adjudged and Decreed that all costs incurred herein are taxed against the defendants, G. Obie Sheets and Chester Sheets, for all of which let execution issue.

To which action and ruling of the Court the defendants in open Court duly excepted.

Done this the 13th day of October, 1939.

JAMES C. WILSON,
United States District Judge.

**DEFENDANTS' MOTION FOR NEW TRIAL AND FOR
RECONSIDERATION OF THEIR MOTION TO RE-
MAND.**

45

Filed Oct. 23, 1940.

(Title Omitted.)

To Sharnock Oil & Gas Corporation, Plaintiff in the above
entitled and numbered cause, to Underwood, Johnson,
Dooley & Wilson, Amarillo Building, Amarillo, Texas,
and to William Sutton, Attorneys for said Plaintiff:

Please Take Notice:

That on this the 23rd day of October, 1939, a motion for
a new trial and a motion for a reconsideration of the
Court's order overruling defendants' motion to remand has
been filed, upon all of the record in this cause, and that
the undersigned will move, at Amarillo, Texas, for a new
trial of this action on the grounds set forth in the accom-
panying motions.

Dated this the 23rd day of October, A. D. 1939.

MONNING & SINGLETON,

Attorneys for Defendants, G.
Obie Sheets and Chester
Sheets (Doing business as
Friona Independent Oil Com-
pany),

By **E. BYRON SINGLETON,**
Of Counsel.

46

(Title Omitted.)

To the Honorable James C. Wilson, United States District Judge:

Now come G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, the defendants in the above entitled and numbered cause, and move this Court for an order setting aside the verdict and judgment herein, and granting a new trial of the above entitled cause, and further move this Court to reconsider its order overruling defendants' motion to remand the above entitled cause to the State Court, and as grounds for said motions for new trial and reconsideration set forth the following reasons:

I.

The Court is in error in holding against the defendants in their motion to remand this cause, and in the Court's ruling that the cause was properly removable and was properly removed, and that such opinion of this Court, given in that regard, was erroneous in that:

(a) The Court is in error in its construction of waiver, in that the plaintiff by the act of selecting the State forum in its original suit for an amount in excess of \$3,000.00, and being for \$5,390.42, was such a selection of forum as bound nonresident plaintiff to hear all matters growing out of such transaction in the State forum;

(b) Plaintiff, in originally instituting its action in the State Court of Texas, by the filing of such action in excess of \$3,000.00, realized that the defendants would answer thereto by any proper defenses, off-sets, or counter-claims authorized under the laws of Texas for use in the State forum, and that nonresident plaintiff, with full knowledge of the answers, off-sets and

47

counter-claims which could be filed, selected the State forum and is bound by this selection, and thereby waived its right to thereafter request a removal of the cause to the Federal Court;

(c) The Court erred in its ruling that the nonresident plaintiff did not know that defendants would file a plea of privilege and answer setting up violation of the anti-trust statutes of the State of Texas, an off-set growing out of the transaction, and a counter-claim or cross-action growing out of the transaction, for the reason that the nonresident plaintiff is charged with knowledge of the law, and its ignorance of the law can be no defense to its election of the State forum over the Federal forum in its original institution of a cause of action in the State Court for an amount in excess of \$3,000.00 in this cause, wherein among the parties there is a diversity of citizenship;

(d) The Court erred in its ruling with reference to the construction of election and waiver in that nonresident plaintiff has shown no surprise with reference to the pleadings filed by the defendants, both by way of answer, off-set and counterclaim, and since nonresident plaintiff knew, or was charged with knowledge of issues to be tried, and it elected the State Court, such election is a waiver of its right of selection, and this cause should be remanded.

II.

The Court is in error in holding that the counter-claim urged by defendants is an action which the Federal Court could have held original jurisdiction upon in itself, and being such a counter-claim to allow removal
48 of the cause, and the Court is in error in failing to remand to the State Court upon motion by defendants, for the reasons:

(a) Upon the pleadings then before the Court at the time of application for removal defendants' plea of "off-set" of the sum of \$5,000.00, was in the nature of an abatement, and not an action upon which affirmative relief could be granted, and such allegation therein set forth—and to continue the operations of hauling for plaintiff herein until the sum of \$5,000.00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set to defendants' account";

(b) The Court erred in its ruling that a counter-claim cognizable in a sum in excess of \$3,000.00 appeared in defendants' pleading, in that affirmative relief was limited expressly in defendants' pleading to the sum of \$2,200.00, and being less than \$3,000.00;

(c) The Court erred in its ruling that a counter-claim in excess of \$3,000.00 existed in so far as the defensive pleas setting up violation of the anti-trust statutes of the State of Texas are concerned, in that such defenses were special defenses and were tantamount only to a not guilty and general denial plea, wherein no affirmative relief was prayed for;

(d) The Court erred in its ruling that a counter-claim in excess of \$3,000.00 was evidenced by defendants' pleading with reference to the off-set and abatement plea of \$5,000.00 for hauling, in that such plea was tantamount to the defense of payment from a special and specific fund yet to come into existence, and which special pleas of defense sought no affirmative relief, and was equivalent to a not guilty or general denial in so far as said \$5,000.00 was concerned.

The Court erred in its refusal to sustain the motion to remand to the State Court, in that the Shamrock Oil &

Gas Corporation is not such an original defendant as is entitled to remove this cause from the State Court, and said cause should be remanded.

IV.

The Court erred in refusing to remand this cause to the State Court, in that the Counter-claim contained no separable controversy, in that the basis of said cross-action grew out of the original transaction complained of in plaintiff's petition, and, likewise, the identical parties in cross-action are those in the original suit.

V.

The Court erred in refusing to remand the case to the State Court, in that the nonresident plaintiff filed its suit in the 108th Judicial District Court of Potter County, Texas, in cause No. 14,531, complaining of G. Obie Sheets and Chester Sheets, forming the partnership, doing business as and in the name of Friona Independent Oil Company, and presented its claim upon a verified itemized statement of account, praying judgment against the defendants in the sum of \$5,390.42, and by virtue whereof nonresident plaintiff elected the State forum and waived its right to thereafter make application for removal.

VI.

The Court erred in refusing to submit the following fact questions to the Jury, which said fact questions were specially requested by defendants to be submitted as requested special issues:

(a) "Do you find from a preponderance of the evidence that on or about the 1st day of August, 1937, the defendant Chester Sheets, acting for the defendants, entered into a

verbal contract with the Shamrock Oil & Gas Corporation, through its agent Raymond Woolf, whereby
50 the said defendants agreed that they would not sell, nor offer for sale, at their filling station, or stations, in Friona, Texas, any gasoline other than the gasoline of the said Shamrock Oil & Gas Corporation?";

(b) "Do you find from a preponderance of the evidence that Chester Sheets, acting for himself and his brother, G. Obie Sheets, entered into a verbal contract on or about the 20th day of December, 1938, supplementing the written contract which was entered into on or about the 16th day of May, 1939, wherein and whereby the plaintiff Shamrock Oil & Gas Corporation, acting through its agent Raymond Woolf, agreed that the defendants could pay \$5,000.00 of the open account owed to the plaintiff corporation by the earnings from the use of defendants' equipment?";

(c) "Do you find from a preponderance of the evidence that the plaintiff Shamrock Oil & Gas Corporation, acting through its agent Raymond Woolf, agreed with the defendant Chester Sheets that it would not sell its gasoline to any other dealer in his territory, in and around Friona, Parmer County, Texas?";

(d) "Do you find from a preponderance of the evidence that the defendant Chester Sheets, for himself and on behalf of his brother G. Obie Sheets, entered into a contract with Shamrock Oil & Gas Corporation, acting by and through its agent Raymond Woolf, whereby Chester Sheets and G. Obie Sheets agreed to not sell the products purchased outside of that territory in and around Friona, in Parmer County, Texas?"

VII.

The Court erred in giving a general instructed charge on all issues other than that of regulation of price, in that

the testimony was conflicting on other issues controlled by the general charge, and that such conflict was peculiarly within the jury's province to reconcile such inconsistencies in the testimony of any witness, and which error is evidenced in the Court's instructed verdict to the jury with reference to the following facts:

(a) Whether or not defendants agreed to buy exclusively all gasoline which they may purchase for whatever purpose from the Shamrock Oil & Gas Corporation;

(b) Whether or not the Shamrock Oil & Gas Corporation required defendants, by an agreement, to sell gasoline only within a limited territory;

(c) Whether or not Shamrock Oil & Gas Corporation agreed with the defendants that it, in turn, would sell to no other person save and except the defendants within a definite territory;

(d) Whether or not an agreement existed between plaintiff and defendants whereby defendants could pay \$5,000.00 of their debt out of a particular fund and being a fund to be created from hauling operations;

(e) Whether or not the plaintiff breached the contract with the defendants in the amount of the damages to the defendants by virtue of such breach, with reference to the breach of the contract for hauling.

VIII.

The Court erred in its oral charge to the jury in their consideration of the fact question of whether or not defendants agreed with plaintiff to sell the products of

plaintiff only at those prices at which the major Oil Companies sold like products, at Friona, Texas, in that:

(a) The oral charge of the Court placed an undue burden upon the defendants, in that it required the defendants to prove the existence of such contract beyond a doubt;

(b) The oral charge of the Court to the jury was erroneous in that it instructed the jury that if they had a doubt with reference to whether such a price agreement contract was entered into they were to find for the plaintiff and answer such question "no";

52 (c) The rule of preponderance of the evidence given to the jury was improper, whereby defendants were charged with carrying a greater burden of preponderance than required by law;

(d) The oral charge excluded all testimony introduced in the hearing of the trial other than the testimony of the defendant Chester Sheets and the testimony of Raymond Woolf with reference to what was said at the time of their meeting at Amarillo, Texas, and that the exclusion of the other evidence was materially detrimental to the defendants;

(e) The oral charge excluded a consideration of all of the corroborating testimony which evidenced that an agreement had been reached with reference to price fixing and such exclusion of that testimony is error;

(f) The oral charge of the Court was tantamount to an instructed verdict for the plaintiff, and, as such, was error.

IX.

Attorney for the plaintiff used prejudicial and improper argument in his final argument to the jury, in that he misquoted the record, as we remember such record, in telling the jury as a fact that there was no testimony to the effect that the Shamrock Oil & Gas Corporation sold to either the Phillips Petroleum Company or to the Texas Company, and since such stations were the only major Oil Company Stations at Friona, Texas, such statement of fact to the jury was calculated to cause them to believe, and upon information and belief defendants say that the jury did so believe, that such fact statement was true and thereby was to the material detriment of the defendants and was improper argument.

X.

Attorney for the plaintiff used prejudicial and improper argument in his final argument to the jury, in that, Mr. Dooley, in his closing argument in the case, used improper argument, clearly telling^d the jury the result of
53 its answer, he stating in his argument, in substance, the following:

"Gentlemen of the Jury, you should be careful, or go slow, before you answer this issue 'yes', because if you do answer the issue 'yes' then you might do this plaintiff Company an injustice; on the other hand, since the defendants admit that they got the merchandise and got the money if you should be mistaken in the evidence and if you answered it 'no' than you could not hurt the defendants."

Wherefore, defendants respectfully move this Court for the entry of a present order granting a new trial in the

above entitled cause and setting aside the judgment heretofore entered; and, likewise, pray that this Court upon a reconsideration of its order refusing defendants' prayer that the cause be remanded should in all things remand this cause to the State Court for trial.

Dated this the 23rd day of October, A. D. 1939.

MONNING & SINGLETON,
Attorneys for Defendants,
G. Obie Sheets and
Chester Sheets (Doing
business as Friona Independent Oil Company).

By **E. BYRON SINGLETON,**
Of Counsel.

Subscribed and sworn to, before me, by E. Byron Singleton, on this the 23rd day of October A. D. 1939.

MRS. J. E. BROWNING,
A Notary Public in and for
Potter County, Texas.

54 ORDER OVERRULING MOTION FOR NEW TRIAL.

Filed: Mch. 11, 1940.

(Title Omitted.)

Be It Remembered that the Motion For A New Trial And Motion For Reconsideration Of The Court's Order Overruling Defendants' Motion To Remand, heretofore filed in the above entitled and numbered cause on the 23rd day of October, 1939, by the defendants, G. Obie

Sheets and Chester Sheets, doing business as Friona Independent Oil Company, having heretofore been fully presented to the Court and argument of counsel for both plaintiff and defendant having been heard thereon, and the Court having fully considered said Motion and argument is of the opinion and finds that said Motion and argument be in all things overruled and refused.

Now Therefore be it Ordered, Adjudged and Decreed that said Motion For A New Trial And Motion For Reconsideration Of The Court's Order Overruling Defendants' Motion To Remand filed by the defendants herein, be, and the same are hereby, overruled and refused, to which action and ruling of the Court, the defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, except and this day gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana.

Done this the 6th day of March, 1940.

JAMES C. WILSON,
United States District Judge.

Approved as to form.

MONNING & SINGLETON,
E. BYRON SINGLETON.

NOTICE OF APPEAL.

Filed: Apr. 25, 1940.

In the United States District Court for the Northern
District of Texas, Amarillo Division.

The Shamrock Oil & Gas Corporation, Complainant,
vs. Civil Action No. 73.

G. Obie Sheets and Chester Sheets, doing business as
Friona Independent Oil Company, Defendants.

Notice is Hereby Given that G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, the defendants above named, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, from the order of the District Court overruling defendants' motion to remand and from the judgment of the Court overruling the motion for a reconsideration of the Court's order overruling defendants' motion to remand, and being a final judgment entered in this action at the same time that the Court overruled the motion for a new trial herein, and which judgment was entered in this action on March 6th, 1940.

Dated this 18th day of April, A. D. 1940.

E. BYRON SINGLETON,
Of Counsel.

MONNING & SINGLETON,
Attorneys for Appellants.

G. OBIE SHEETS and CHESTER SHEETS,
Doing business as Friona Independent Oil Company.

COST BOND.

Filed: Apr. 25, 1940.

(Title Omitted.)

Know All Men By These Presents, that G. Obie Sheets and Chester Sheets, as principals, and the other undersigned, as sureties, are holden and stand firmly bound and obligated unto The Shamrock Oil & Gas Corporation, a corporation, with an office and place of business in Amarillo, Potter County, Texas, in the full and just sum of Two Hundred Fifty Dollars(\$250.00) to be paid unto the said The Shamrock Oil & Gas Corporation, its successors or assigns, to the which payment well and truly to be paid, the said G. Obie Sheets and Chester Sheets, their heirs, executors and assigns, and the other undersigned, their heirs, executors and assigns, do bind themselves firmly by these presents.

The Condition of this obligation is such that whereas the District Court of the United States for the Northern District of Texas, Amarillo Division, entered its final order on March 6, 1940, overruling the motion to remand this cause to the District Court of Parmer County, Texas, which said order was entered after the presentation of a motion for a reconsideration of the previous order overruling defendants' motion to remand said cause and after a final judgment on the merits of said cause, entered on the 13th day of October, 1939, in favor of The Shamrock Oil and Gas Corporation against the defendants, G. Obie Sheets and Chester Sheets, jointly and severally, and as partners, doing business as and in the name of Friona Independent Oil Company, for the amount of \$5,390.42, with interest at the rate of 6% per annum from the 14th day of May, 1939, to date of judgment, in the total sum of \$5,524.28, and that

said judgment shall bear interest from date of judgment at the rate of 6% per annum, and further taxing all costs incurred against said defendants, and from which order defendants desire to appeal to the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana;

Now, Therefore, if the said obligors shall pay all the costs awarded or decreed against them by the Court in the above-described cause if the appeal is dismissed or the judgment affirmed, or for such part of the costs as the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana, may award against them if the judgment be modified, then this obligation shall be void.

In Witness Whereof we have hereunto set our hands on this the 13th day of April, A. D. 1940.

OBIE SHEETS,
CHESTER SHEETS,
Principals.
CLYDE SEAMOND,
MRS. OLA SHEETS,
Sureties.

Approved this day of April, A. D. 1940.

.....

United States of America,
Northern District of Texas,
Parmer County, ss.

Clyed Seamond and Mrs. Ola Sheets, being duly sworn, each deposes and says that they are the sureties named in the foregoing bond; that they reside at Friona,
58 Parmer County, Texas; that they are residents of and householders within the State of Texas, and are each worth Five Hundred Dollars over and above all

the debts and liabilities which they owe or have incurred, and exclusive of the property exempt by law from levy and sale under an execution.

CLYDE SEAMOND,
MRS. OLA SHEETS.

Subscribed and sworn to before me, on this the 13th day of April, A. D. 1940, to certify which witness my hand and seal of office.

J. W. WHITE,
A Notary Public in and for
Parmer County, Texas.

The State of Texas,
County of Parmer.

I, Earl Booth, Sheriff of Parmer County, State of Texas, do hereby certify that in my estimation the sureties on the foregoing bond are well and sufficiently financially able to care for the amount stipulated in such bond, and that the property and valuations set forth therein are in my estimation true and correct, and were this bond submitted to me I would accept same.

Witness my hand, this the 12 day of April, A. D. 1940.

EARL BOOTH,
Sherif of Parmer County,
Texas.

59

DEFENDANTS' DESIGNATION FOR RECORD.

Filed: Apr. 25, 1940.

(Title Omitted.)

Come now G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, defendants

herein, and submit this their Assignments of Error and designation of the portion of the record and proceedings in evidence to be contained in the record on appeal, and say:

I.

The Court erred in its order overruling defendants' motion to remand to the State Court, and erred, as well, in its order and judgment overruling defendants' motion for a reconsideration of that order denying defendants' right to remand; no other order or judgment, or error in order or judgment, is complained of save and except that error of the Court in failing to remand the cause from the United States District Court for the Northern District of Texas, sitting at Amarillo, to the District Court for the State in and for Parmer County, Texas.

Wherefore, defendants herein and appellants designate as pertinent for consideration by the Circuit Court of Appeals of this record the following portions of the transcript:

1. Shamrock Oil & Gas Corporation's Original Petition filed in Potter County, Texas;

60 2. Plea of Privilege of defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, filed in Potter County, Texas;

3. Order of the District Court of Potter County, Texas, transferring the cause to Parmer County, Texas;

4. Answer and Cross-action of defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, filed in Parmer County, Texas;

5. Petition for removal and bond of Shamrock Oil & Gas Corporation;

6. Order of removal from the District Court of Parmer County, Texas, to the United States District Court for the Northern District of Texas, sitting at Amarillo, Texas;

7. Motion to remand by defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company;

8. Answer of Shamrock Oil & Gas Corporation to motion to remand;

9. Order overruling motion to remand by the United States District Court for the Northern District of Texas, Amarillo Division;

10. Judgment entered on the 13th day of October, 1939, by the United States District Court for the Northern District of Texas, Amarillo Division;

11. Motion by defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, for a reconsideration of the Court's order overruling the motion to remand and motion for new trial;

12. Answer of Shamrock Oil & Gas Corporation to motion for reconsideration of Court's order overruling motion to remand and motion for new trial;

13. Order and judgment dated March 6, 1940, overruling and refusing motion for reconsideration of the Court's order overruling motion to remand and motion for new trial;

14. Notice of Appeal; and, Bond for Costs;
15. This designation;
16. Application for Permission to Take Appeal, and Order Allowing Appeal;
17. Assignments of Error;

61 Wherefore, defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, and appellants herein, evidence that in view of the order complained of that the above parts of the transcript designated are the sole and only records necessary for an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana.

E. BYRON SINGLETON,
Of Counsel.

Monning & Singleton, 1014 Fisk Building, Amarillo, Texas, Attorneys for Appellants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company.

62 APPLICATION FOR LEAVE TO APPEAL.

Filed: Apr. 18, 1940.

(Title Omitted.)

To the Honorable James C. Wilson, United States District Judge:

G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, your petitioners, who are the defendants in the above entitled cause, pray that they may be permitted to take an appeal from that order

of this Court overruling their motion to remand this cause to the District Court of Parmer County, Texas, which such order was finally entered on the 6th day of March, 1940, after a final judgment on the merits in this case, which such order was entered after the presentation of a motion of these defendants for a reconsideration of the previous order overruling defendants' motion to remand the above entitled cause; your petitioners pray that they may be permitted to take an appeal to the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana, for the reasons specified in the assignments of error which are filed herewith.

Your petitioners pray that that portion of the transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana.

Your petitioners have filed herewith an appeal bond in the sum of \$250.00, together with notice of appeal, and such bond is conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or for such part of the costs as the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana, may award if the judgment be modified. Your petitioners pray that this bond in the amount stipulated therein be approved.

E. BYRON SINGLETON,
Of Counsel.

Monning & Singleton, 1014 Fisk Building, Amarillo, Texas, Attorneys for Appellants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company.

64 ORDER OF JUDGE JAMES C. WILSON ALLOWING APPEAL.

Filed: Apr. 22, 1940.

(Title Omitted.)

The petition of G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, defendants in the above entitled cause, for an appeal from the order of this Court overruling their motion to remand this cause to the District Court of Parmer County, Texas, as such order was finally entered on the 6th day of March, 1940, upon a consideration of the motion of these defendants for a reconsideration of this order overruling defendants' said motion to remand, and being after a final decision and hearing on the merits, is hereby granted and an appeal is allowed; the bond in the sum of \$250.00, together with the sureties thereon, is hereby approved, and the Clerk is required to prepare a transcript, inclusive of the items designated and likewise including therein any portions prayed for by Appellee, The Shamrock Oil & Gas Corporation, which may hereafter be found proper and appropriate.

Dated this the 20 day of April, A. D. 1940.

JAMES C. WILSON,

United States District Judge.

65 DEFENDANTS' ASSIGNMENT OF ERRORS.

Filed: Apr. 25, 1940.

(Title Omitted.)

Come now G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, defendants in the above entitled cause, and file the following Assign-

ments of Error upon which they will rely in the prosecution of the appeal herein prayed for in said cause, from the order of this Court entered on the 6th day of March, 1940.

I.

The Court erred in refusing the motion of defendants to remand this cause to the District Court of the State of Texas in and for Parmer County for the reasons that:

1. The Court is in error in holding against the defendants in their motion to remand this cause, and in the Court's ruling that the cause was properly removable and was properly removed, and that such opinion of this Court, given in that regard, was erroneous in that:

(a) The Court is in error in its construction of waiver, in that the plaintiff by the act of selecting the State forum in its original suit for an amount in excess of \$3,000.00, and being for \$5,390.42, was such a selection of forum as bound nonresident plaintiff to hear all matters growing out of such transaction in the State forum;

(b) Plaintiff, in originally instituting its action in the State Court of Texas, by the filing of such action in excess of \$3,000.00, realized that the defendants would answer thereto by any proper defenses, off-sets, or counter-claims authorized under the laws of Texas for use in the State forum, and that nonresident plaintiff, with full knowledge of the answers, off-sets and counter-claims which could be filed, selected the State forum and is bound by this selection, and thereby waived its right to thereafter request a removal of the cause to the Federal Court;

(c) The Court erred in its ruling that the nonresident plaintiff did not know that defendants would file a plea of privilege and answer setting up violation of the anti-trust statutes of the State of Texas, an off-set growing out of the transaction, and a counter-claim or cross-action growing out of the transaction, for the reason that the nonresident plaintiff is charged with knowledge of the law, and its ignorance of the law can be no defense to its election of the State forum over the Federal forum in its original institution of a cause of action in the State Court for an amount in excess of \$3,000.00 in this cause, wherein among the parties there is a diversity of citizenship;

(d) The Court erred in its ruling with reference to the construction of election and waiver in that nonresident plaintiff has shown no surprise with reference to the pleadings filed by the defendants, both by way of answer, off-set and counterclaim, and since nonresident plaintiff knew, or was charged with knowledge, of issues to be tried, and it elected the State Court, such election is a waiver of its right of selection, and this cause should be remanded.

2. The Court is in error in holding that the counter-claim urged by defendants is an action which the Federal Court could have held original jurisdiction upon in itself, and being such a counter-claim to allow removal of the cause, and the Court is in error in failing to remand to the State Court upon the motion by defendants, for the reasons:

(a) Upon the pleadings then before the Court at the time of application for removal defendants' plea of "off-set" of the sum of \$5,000.00, was in the nature of an abatement, and not an action upon which affirmative relief

could be granted, and such allegation therein set forth "—and to continue the operations of hauling for plaintiff herein until the sum of \$5,000.00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set to defendants' account.";

(b) The Court erred in its ruling that a counter-claim cognizable in a sum in excess of \$3,000.00 appeared in defendants' pleading, in that affirmative relief was limited expressly in defendants' pleading to the sum of \$2,200.00, and being less than \$3,000.00;

67 (c) The Court erred in its ruling that a counter-claim in excess of \$3,000.00 existed in so far as the defensive pleas setting up violation of the anti-trust statutes of the State of Texas are concerned, in that such defenses were special defenses and were tantamount only to a not guilty and general denial plea, wherein no affirmative relief was prayed for;

(d) The Court erred in its ruling that a counter-claim in excess of \$3,000.00 was evidenced by defendants' pleading with reference to the off-set and abatement plea of \$5,000.00 for hauling, in that such plea was tantamount to the defense of payment from a special and specific fund yet to come into existence, and which special pleas of defense sought no affirmative relief, and was equivalent to a not guilty or general denial in so far as said \$5,000.00 was concerned.

3. The Court erred in its refusal to sustain the motion to remand to the State Court, in that the Shamrock Oil & Gas Corporation is not such an original defendant as is entitled to remove this cause from the State Court, and said cause should be remanded.

4. The Court erred in refusing to remand this cause to the State Court, in that the counter-claim contained no separable controversy, in that the basis of said cross-action grew out of the original transaction complained of in plaintiff's petition, and, likewise, the identical parties in cross-action are those in the original suit.

5. The Court erred in refusing to remand the case to the State court, in that the nonresident plaintiff filed its suit in the 108th Judicial District Court of Potter County, Texas, in cause No. 14,531, complaining of G. Obie Sheets and Chester Sheets, forming the partnership, doing business as and in the name of Friona Independent Oil Company, and presented its claim upon a verified itemized statement of account, praying judgment against the defendants in the sum of \$5,390.42 and by virtue whereof nonresident plaintiff elected the State forum and waived its right to thereafter make application for removal.

Wherefore, defendants as appellants herein, pray that said order may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated this the 18th day of April, A. D. 1940.

E. BYRON SINGLETON,

68

Of Counsel.

Monning & Singleton, 1014 Fisk Building, Amarillo, Texas, Attorneys for Appellants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company.

69

NOTICE OF REMOVAL, omitted from the printed record, pursuant to Rule 23 of this Court.

Filed: May 2, 1940.

(Title Omitted.)

Sept. 25, 1939.

I will dispose of the motion to remand in the case of the Shamrock Oil & Gas Corporation vs. G. Obie Sheets and Chester Sheets. There being no exact authority on the principal question really decisive of the motion, I felt for the purpose of the record anyway, the Court should state rather fully the reasons for the conclusion reached.

Now, as I understand it from the pleadings and the arguments, the situation is this: The Shamrock Oil & Gas Corporation is a manufacturer of gasoline and other products of crude petroleum, with its principal place of business in Moore County, Texas; that it has an office and place of business in Potter County; that it is a Delaware corporation; that these defendants are citizens of Texas, and reside in Parmer County, Texas; that the plaintiff is a distributor of its manufactured products to dealers, such as gasoline stations, throughout this section of Texas; that sometime in the early part of 1937, the plaintiff made a contract with the Sheets brothers, defendants, by which they were to become, within limited areas, distributors of the products of the plaintiff; that the contract, however, attempted to make them independent contractors, with the title of such goods

passing to defendants upon delivery to them; that such contract resulted in an open running account, with credits and charges, and continued until in July of this year, when it amounted to something over \$5,300.00; that the plaintiff company about that time sued the defendants on this open account, the items of which

ran from the early part of 1938 to near July of this year, in Potter County, Texas, where the plaintiff had an office; that immediately thereafter, the defendants filed their plea of privilege, to be sued in the county of their residence, and that this plea was not resisted by plaintiff, and could not have been successfully, and the case was transferred to Parmer County; that then the defendants filed their answer to the claim. It contained a general demurrer and general denial; but there were no specific charges or credits alleged by the plaintiffs denied. The defendants sought to defeat the entire account on the ground that the contract as entered into between plaintiff and defendants was in violation of the anti-trust laws of Texas, and was, therefore, a void and non-collectable account.

I will not read all that feature of the answer, but in substance is, that about the first of the year of 1937 the plaintiff entered into an agreement with the defendants whereby they bound themselves to sell the products at a price named by plaintiff, and to exclusively handle the products of the plaintiff; that this amounted to a conspiracy in restraint of trade, and in violation of the Texas statutes. It further alleged at the same time and other times, the agreement by them provided that they were to comply with the price regulations made by the major oil corporations and follow their price fluctuations, and that this was in furtherance of a monopoly, and made the contract void and unenforceable, and of which they ask judgment.

Now, in addition, the defendants filed, what they call, a cross-action and offset, but which, of course, whatever it may be called, is a counter-claim, being as follows:

73 "And, by way of cross-action and as an off-set defendants and cross plaintiffs further say:

"On or about the 1st day of February, 1939, plaintiff entered into an agreement with the defendants, and each of them, whereby the defendants were to purchase newer and improved equipment for the *transporation* of gasoline, and were, in turn, to lease said truck by hauling Shamrock gasoline from Shamrock plants to the various retail establishments created by the plaintiff herein, and were to use said truck and to have the depreciation, up-keep, and cost of operation of said truck paid by the plaintiff and to continue the operation of hauling for plaintiff herein until the sum of \$5,000.00 was earned by the defendants from the operation of said truck in the *transporation* of gasoline, to be used as an off-set to the defendant's account; that immediately thereafter, to induce the defendants, and each of them, to expend their funds for such gasoline truck and *transporation* equipment, and to cause them to enter into such contract with plaintiff for hauling of such gasoline, plaintiff agreed to allow defendants to continue to operate at least one truck in such manner, whereby plaintiff was obligated to pay the salary of the driver, the cost of operation, depreciation, and up-keep and to yield a sum of approximately \$300.00 monthly to the defendants, and that said contract should continue indefinitely, as long as defendants desired to continue making said hauls; that although defendants placed themselves in a position to make such hauls and commenced making such hauls, soon thereafter plaintiff refused to allow defendants to haul its gasoline, and soon thereafter concluded its sale of gasoline to these defendants.

"Wherefore, defendants and each of them, have been damaged in the sum of \$5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of \$2,200.00 for which defendants pray by way of cross-action against the plaintiff herein."

Immediately thereafter and in due time, the plaintiff, non-resident, filed a bond and petition for removal to this Court. They possessed the statutory requisites. It was removed. Following that the defendants filed this motion to remand.

I refer to only one ground assigned in the motion, and that is that, by plaintiff filing the suit in the State District Court of Potter County it elected to try the suit in the State District Court, and waived its right to remove under the statute. The effect of it is that plaintiff elected to try its suit, including this counter-claim, in any District Court of the State, where the proper venue of it lay.

Now, we know that the mere filing of such a
74 suit by a non-resident is not an absolute bar to such a removal by it. For example, it is conceded where a non-resident sues a resident of the state, in a State Court, for an amount less than the jurisdiction amount of the Federal Court, and such resident defendant brings in a counter-claim greater than \$3,000.00 exclusive of interest and cost, such non-resident plaintiff may then properly remove the case to the Federal Court. Those decisions really turn on a question of intent, and it follows, more or less, on a fact question. In other words, those authorities now unanimously hold as conclusive, from the circumstances of a non-resident filing a suit in a State Court for less than \$3,000.00, that there is no intent on the part of such non-resident to waive its right to removal, for the simple reason it could not have been filed in the Federal Court. In such circumstances it is necessary to file it in the State Court, or not file anywhere. Upon that the Courts argue, which is obviously correct, that it conclusively shows that there is an absence of a proven intent of the non-resident to waive this right, which is considered and is a valuable right. Those authorities, however, are not in point here, but their reasoning is helpful.

Here the plaintiff, a non-resident corporation, sued the defendants who were residents of Parmer County, Texas, in the District Court of Potter County, for a sum in excess of \$5,000.00, and it was transferred to a District Court of Parmer County on a plea of privilege by defendants, and there defendants filed a counter-claim for more than \$6,000.00. Can the non-resident remove to this Court? As stated, there are no authorities exactly in point. All of the authorities, certainly all the Federal and Texas authorities are agreed that, when the defendant files a counter-claim such as this he becomes, as to it, plaintiff, and the plaintiff, as to such counter-claim becomes defendant. That is really not questioned by anybody here, and the viewpoint of the Federal Courts, as well as Texas Courts is very well expressed in 38 Texas Jurisprudence p. 292, Section 6:

"A cross bill or cross action, or a plea in reconvention, or a set off or counter claim is, or occupies the same position as, an independent suit by the defendant in the original suit against the plaintiff. As to the matter asserted in his cross action or plea the defendant is the actor or plaintiff; and he has the rights and responsibilities of a plaintiff; while the plaintiff in the original suit is a defendant, with the privileges of a defendant. In other words, each party is plaintiff in respect to his own particular grievance and each party is defendant in respect to the grievance of the other. There are two cases which may be tried together in the same proceeding, or it has been said two actions are really combined into one."

That part of the removal statute applicable here, reads:

Sec. 71 of Title 28:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are

given jurisdiction, in any State Court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

There is really no controversy as to plaintiff's cause of action. As to the counter-claim the parties had a controversy, in a State Court wholly between citizens of different states, with the parties re-arranged so the defendants were plaintiffs and the plaintiff was defendant. The amount in controversy is in excess of \$3,000.00 exclusive of interest and cost. An incontrovertible right, under the statute, is thus shown in the non-resident to remove, unless that right has been lost. The defendants insist that it was lost by the non-resident waiving its right to remove, by filing its account in a State Court which was without authority to try it, and a State Court other than the one to which it was removed by defendants.

The question is, was there a waiver by this non-resident to try this counter-claim, in the Federal Court? Deciding that question, resolves itself largely into a question of intent or fact.

76 My friend, Judge Peters of Maine, dealt with waiver in the case of Houlton Savings Bank vs. American Laundry Machinery Co., 7 Fed. Suppl. 858. He said:

"A waiver is the voluntary relinquishment of a known right. The only evidence of an intention on the part

of this defendant to relinquish its right to have a possible controversy with the banks about this property settled in this Court is that he brought in the State Court a suit against another party involving other rights in the same property. This act is certainly not 'Irreconcilably repugnant to the assertion of its legal right'.

"The defendant should not be deprived of its constitutional and statutory right to a trial in a Court of the United States upon the ground of waiver, 'unless a clear case of intent to submit and have a hearing in the State Court is made to appear'".

It must be kept in mind that such a waiver, if it exists and is shown, must be of a known right. The right involved here is the right to remove the suit filed by defendants against plaintiff. Defendants' claim is pleaded in offset, but really is a separate suit from the one filed by plaintiff. Circumstances must be sufficient to show that the party had in mind the right which he is claimed to have waived, and knowing of such right, waived it.

As a circumstance tending to disprove such an intent, it is well to note that this corporation filed this suit, not in Parmer County, the home of these defendants, but in Potter County, where it has an office, and as far as I know, its principal office. It filed it on a mere open, running, account, about which it had a right to expect no serious controversy, and that was confirmed by the fact that in the State Court not an item of it was specifically denied. In similar cases it has been argued that, the non-resident must take notice that counter-claims might be filed. Certain Courts in dealing with that suggestion have properly said, "that is begging the question". That proposition cannot be sustained except upon the theory that a non-resident irrevocably loses the right to remove by filing such a suit. "There is no

77 sense here in charging this plaintiff with notice, similar to notice by filing instruments of record, etc. That would be what it would amount to if plaintiff is charged with notice here. For the purpose of this question, nothing must be assumed against a plaintiff to the effect of knowledge that everything was going to happen in the State Court that did thereafter happen. Now the plea of privilege filed, taking all into account that happened in that connection, what bearing has it on this question of intent? Can it be reasonably assumed from the fact that plaintiff did not take a non-suit when the plea of privilege was filed that it was willing to try out with defendants their counter-claim, later filed, in the District Court of Parmer County? However far fetched and unreasonable that counter-claim on its face may be, it would be nothing less than absurd, nothing less than false, for one to hold any such thing. The plaintiff is a corporation and a rather large one. Parmer County is a sparsely settled county, the home of these defendants, likely with local prejudice against foreign, or any other kind of corporations; with a like local prejudice or bias in favor of these defendants; where if a jury was impaneled, in all probability, the defendants would have a personal acquaintance with all of them and possibly a friendship with many of them. Regardless of the fairness and ability of the State Judges the effect upon the final results of the fact finding power of the jury cannot be, and is not, overlooked by such litigants. It is safe to say, to take advantage of these factors, you might say most of them matters of common knowledge, was the chief aim of defendants in filing the plea of privilege, since even in Parmer County they did not challenge the correctness of plaintiff's claim. In passing on this matter of whether plaintiff had a clear intent to submit generally to the jurisdiction of the State Court to try defendants' counter-claim against it

why not look at the naked truths that would appear in the picture if it had considered such a thing? The most that could fairly be assumed from its failure to take a non-suit and their permitting the case to go to Parmer County is that it was willing to try out its cause of action against defendants, together with any
 78 strictly defensive pleas, in the county of their residence. Of course, after the counter-claim was filed in the State Court, both as a counter-claim and as an offset, plaintiff could not dismiss the case. It then had no alternative but to remove.

There is a substantial right involved under the removal statutes. Why should this Court be holding as a fact, or holding as true, something it knows in reason, or knows absolutely, is not the truth. In other words, this Court knows that by no stretch of imagination, did this plaintiff ever intend to let itself be tried in Parmer County, on any suit that defendants might file against. Defendants' position as to plaintiff's intent could be stronger argued if they had filed their counter-claim in the District Court of Potter County. The only State Court plaintiff chose to try its cause was the Potter County District Court. It did not choose the District Court of Parmer County. Pleading the counter-claim as an offset is simply an ingenious device to deprive plaintiff of its right to remove to this Court. As to defendants collecting any judgment they might procure against plaintiff, it made no difference whether defendants' claim was pleaded only as a counter-claim or as both.

This removal statute is supposed to be based upon the best of reasons. Especially should I so hold when I know it is not the truth, and when it deprives plaintiff of a valuable right, and a right that is considered to be reassuring and a protection to non-residents against jury verdicts rendered, not of the facts and the law of the case, but upon bias, local prejudice, personal friendships

and every other kind of sentimental consideration that might enter into it. Touching that, I am like the District Judge of South Carolina, in the case of the American Fruit Growers vs. Laroche, 39 F. (2d) 243. He was dealing with this question of waiver, and he also had the feature, as to whether there was an understanding of the parties to waive known rights. I think what he said fits this case:

"It is only by the most technical reasoning and by laying aside the actualities of the case and the real position of the parties that the right to remove can be denied."

For this Court to do that, it would have to base its action upon fictional and technical considerations, a thing I do not care to do. For the reasons stated, your motion to remand will be overruled.

80

CHARGE OF COURT.

Filed May 11, 1940.

(Title Omitted.)

Gentlemen of the Jury:

The plaintiff at the conclusion of the evidence presented a motion to the Court for an instructed verdict in its behalf, the position being that taking all of the evidence into consideration before you, that presented by the defendant particularly, and treating it as true, that it did not legally make out the case alleged by the defendants in their counterclaim and in their defense against the plaintiff. As I told you in the previous charge, some of these matters were decided for each

side. I decided against the plaintiffs on their contention that the evidence as introduced by the defendants touching the issue as to price fixing would not constitute a violation of the anti-trust laws as testified to by the defendants. It struck me if the thing were as the defendants related in their testimony as to that price fixing issue, that it would constitute a violation of the anti-trust laws of Texas, so that left an issue of fact which was submitted to you and you have found on that fact issue against the defendants.

As I indicated to you in the previous charge I considered all other questions resolved themselves really into questions of law which were matters for the
81 Court to decide. In view of your verdict and the conclusions that I have reached on the matters I held for myself to dispose of, I am going to instruct you on the whole case to find a verdict for the plaintiff.

Now, one other issue on the anti-trust question, under the testimony of the defendants, was whether they had agreed in this contract to buy all of their gasoline and oil products from the plaintiff. That is in substance the allegation of the defendants. Taking, however, the testimony of the defendant Chester Sheets, I believe his name is, it appeared to me that his testimony was different from his pleading. That his testimony did not support the claim that the plaintiff had required them to agree to buy all of such products from them. I reached that conclusion after I called upon the Court Reporter to transcribe for me the testimony of Mr. Chester Sheets bearing upon that issue. He isn't only a witness in the case, but he is a party to the suit and he is the only one on his side that claims to know what this contract was, since he was the one that negotiated the contract with Mr. Wolfe—I believe the name is—so, being a party, what he says about it constitutes not only testimony but more than that. It constitutes an admission on his part

as to whether the agreement was that the plaintiff Shamrock Company required them to buy all of such products from them, or whether it was simply the agreement that they would buy all of such products that were sold at the Friona station from them. That was the matter that I wanted to settle. The cross-examination of Mr. Sutton of defendant Sheets on that issue is quite lengthy, and I will not read all of it, but certain of the questions and answers I will read:

(By Mr. Sutton):

Question: Now, as I understood you to testify this morning, Mr. Wolfe said you would have to buy all your needs there, all you needed for that station, from the Shamrock?

Answer: That I would have to buy all I used for that station, couldn't buy from any other company.

Question: Yes. That was what you testified
82 to?

Answer: Yes, sir.

Question: Was that agreement as to all your requirements that you needed for that station; was that what he requested you to do?

Answer: All my needs.

Question: All the gasoline you needed for that station, is that what I understand your testimony was?

Answer: Understanding? I guess so. Don't know what you are exactly getting at.

Question: I am just trying to get at what you said Mr. Wolfe required you to do, and asked you to do. Did I understand you to say that he said you would buy all your needs, of the gasoline you needed for that station, you would buy from Shamrock? Exclusively?

Answer: Yes, sir.

Question: That was only as to the amount of gasoline, all you need to operate that station, is that right?

Answer: Yes, sir.

Question: And that was what the agreement was?

Answer: Yes, sir.

Question: Now then, that and the price, was that the only conditions that he put upon your right to purchase, is that right?

Answer: I reckon so, as far as I know.

Question: Beg pardon?

Answer: I reckon so, as far as I know.

Question: Well, I want to see if I understand you now. You testified you went in there to talk to Mr. Wolfe about handling Shamrock Oil and Gasoline Corporation gasoline?

Answer: Yes, sir.

Question: He said, "All right, you could sell Shamrock gasoline down there, but you have to agree that you would not sell it below the major prices and
83 that you would further have to agree that all gas—that you buy all the gas you needed for that station from the Shamrock; now, is that what he said?

Answer: Yes, sir.

There are several pages here to the same effect, but as I say, not necessary to read. Now, gentlemen, I hold that testimony of Mr. Sheets to represent facts about that agreement. It is my view under the case of Cox, Inc., vs. Humble Oil and Refining Co., 16 S. W. (2d) 285, that such an agreement does not constitute a violation of the anti-trust laws of Texas. That case was by the Commission of Appeals, and was expressly approved by the Supreme Court of this State. Part of the decision bearing directly on that phase:

"It is further insisted that the recovery sought and obtained by plaintiff in error is for breach of an alleged contract in restraint of trade, and Wood vs. Texas Ice

and Cold Storage Co., (Tex. Civ. App.) 171 S. W. 497, is cited to sustain the proposition that no action is maintainable thereunder. We are of the opinion that the contract condemned in the above case is unlike that involved in this case. There the contract obligated Wood "to make all of his purchases from the first party during the term of this contract". We think it was correctly determined in that case that the contract was in violation of the provision of our anti-trust laws, defining a conspiracy in restraint of trade as being where two persons, firms, or corporations engaged in buying or selling any community agree to refuse to buy such commodity from or sell it to any other person, firm, etc. Here plaintiff in error did not agree to buy all of the gasoline purchased by him from defendant in error. The agreement was that he would buy the amount used in the operation of a certain filling station. He was at liberty to purchase any amount of gasoline from any other company which might be used in the operation of any other similar business. The effect of the agreement made by him was to contract to purchase gasoline from defendant in error, the amount to be measured by that used in the operation of a particular filling station. Such agreement did not constitute a conspiracy in restraint of trade, but was a valid and enforceable one."

Now, under the testimony read to you, it resolves the matter into a question, not disputed in my view, that under the contract here the Shamrock wasn't bound to
 84. confine its sale to the defendant, but could and did sell its gas to anyone it desired in addition to these defendants. On the other hand the defendants were limited under this contract only to purchase from the plaintiff the gasoline for the one station at Friona. The defendants were at liberty to buy gasoline elsewhere that they might see fit to sell at places

other than this Friona station. Under this contract the public were free to buy gas of the Shamrock company, and the defendants were free to buy like gas from any other refining company, except such as they were to sell at the particular station at Friona. The public were therefore in no manner prejudiced by the operation of that contract, and essentially had no interest in it. And for the reasons assigned in this decision just read, it is my view that the defendants have not made out that branch of their case. This case I have just read over was re-affirmed in the case of Jones Investment Company vs. Great A. and P. Tea Co., 65 S. W. (2d) 495, it being therein again expressly approved by the Supreme Court.

Gentlemen, this discussion by the Court may not be very interesting to you, but it is necessary for this Court in disposing of the case in this way, with a view of possible appeal of the case, to give either an oral charge or a written charge the ground—the reasons, under the rules, for the Court's action. In other words so that the reason may become a matter of record. Now, the remaining issue which isn't submitted to you, and which I am disposing of myself, is the question of damages claimed by the defendant, approximately in the sum of six thousand dollars, for the alleged breach by the plaintiff of the truck contract, or the new truck contract, I will say. The first contract, when it was made, I don't remember, but along with it the defendants, Sheets Brothers, leased to the plaintiff a Chevrolet truck. Just what the compensation was to be paid for that truck is expressed in the written contract, 16th day of May, 1933, and what it was to be is immaterial—in effect, the net made by the operation of the truck. The defendants allege that during December of that year that they had a contract by which they were to substitute a new truck in lieu of the old Chevrolet truck. That

they did this pursuant to that contract. That after the lease plaintiff was to run it day and night until it paid to the defendants a rental of approximately five thousand dollars, and which rental or lease return for the truck was to be applied to the liquidation of this standing account which is here sued upon. And they allege that delivery of that truck was made and that they entered in on the operation under that contract and that it was breached and that if it had not been they would have made profits in the amount of these damages claimed, etc. Now, I am eliminating that issue of damages, or disposing of it myself, against the defendants for these reasons. The undisputed evidence here is, and there are records covering that fact, that the defendants did not actually deliver that new truck until about the middle of March of 1939, and that the plaintiffs only used it until the 15th day of April of 1939. That date is on the face of the original contract following the words "canceled". In other words, as to that issue the facts boiled down make the issue for whatever the contract might have been for only a period of approximately one month. In other words it reduces, under the undisputed evidence, that claim of damages in any event, if the defendants were entitled to it, has been reduced to a trifling sum, the net, whatever it would be for that particular month. If allowed damages it would be—it could not be by any possibility, to allow it legally, to allow it for more than just nominal damages. But to my view the evidence here introduced to support the claim on a basis of six thousand dollars is so speculative, and leaves that issue in such a state of uncertainty that if I instructed you to go out and try to ascertain the damages figured on the basis of that month, one month, that the most you could do would be to absolutely guess at it. You wouldn't know now how to figure it. I say you would not. I would not, taking the character of evi-

86 dence that was introduced. Either it would be purely speculative and purely irresponsible to my view in using it as a jury or Court should use evidence, to fill out a verdict for or against anybody, and for that reason I am just simply in effect eliminating that issue. It is to all intents and purposes eliminated by the undisputed evidence here before you. And for the reasons stated as heretofore given and because this truck contract in its entirety by agreement of the parties was canceled without any reservation whatsoever on the 15th day of April, 1939.

And for the reasons stated as heretofore indicated you will be instructed to return a general verdict for the plaintiff, of course, on its account, because it is not disputed, and in plaintiff's favor on the defense and on the counterclaim.

.....,
U. S. District Judge.

DESIGNATION OF ADDITIONAL PORTION OF RECORD.

87

Filed May 4, 1940.

(Title Omitted.)

Comes now The Shamrock Oil and Gas Corporation, complainant, defendant in cross-action, and appellee in the above entitled and numbered cause, and files within the time allowed its designation of additional portions of the record proceedings and evidence to be included in the record on appeal in said cause, and designates the following portions of such record:

1. Notice of intent to file petition for removal, together with receipt of copy of such notice signed by counsel for defendants and petitioners in cross-action;

2. File mark of Clerk of United States District Court on transcript of record from Parmer County, Texas;

3. Opinion rendered by Judge of District Court of United States on the 25th day of September, 1939, and referred to in Order overruling motion to remand entered on 25th day of September, 1939;

88 4. Charge of Court directing jury to return verdict for The Shamrock Oil and Gas Corporation;

5. This designation of additional portions of record.

Wherefore, premises considered, The Shamrock Oil and Gas Corporation, complainant, defendant in cross-action, and appellee, prays that the additional portions of record above designated be included in the record on appeal.

UNDERWOOD, JOHNSON,
DOOLEY AND WILSON,

o Attorneys for Complainant,
Defendant in Cross-Action, and Appellee,

By W. M. SUTTON,
Of Counsel.

We, the undersigned, attorneys for appellants, hereby acknowledge receipt of a copy of foregoing designation on this the 4th day of May, 1940.

MONNING & SINGLETON,
By BEN P. MONNING.

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CLERK'S CERTIFICATE.

United States of America,
Northern District of Texas.

I, GEO. W. PARKER, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings had in said Court in Civil Action No. 73, wherein The Shamrock Oil and Gas Corporation is complainant and G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, are defendants, as listed in the designations for record filed here, as fully as the same remain on file and of record in my office in the City of Amarillo, Texas. Items Nos. 8 and 12 of Defendants' designation, being Answer of Shamrock Oil & Gas Corporation to Motion to Remand, and Answer of Shamrock Oil & Gas Corporation to Motion for Reconsideration of Court's order overruling motion to remand and motion for new trial, respectively, having never been filed of record in said Civil Action No. 73, do not appear in the transcript of record.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed at the City of Amarillo, in the Northern District of Texas, this the 20th day of May, A. D. 1940.

(Seal)

GEO. W. PARKER,
Clerk of United States District
Court for the Northern Dis-
trict of Texas,
By MARY K. HARTY,
Deputy.

[fol. 127] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 13, 1940

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as
Friona Independent Oil Company,

versus

SHAMROCK OIL AND GAS CORPORATION

On this day this cause was called, and, after argument by E. Byron Singleton, Esq., for appellants, and W. M. Sutton, Esq., for appellee, was submitted to the Court.

[fol. 128] OPINION OF THE COURT—Filed December 6, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as
Friona Independent Oil Company, Appellants,

versus

SHAMROCK OIL AND GAS CORPORATION, Appellee

Appeal from the District Court of the United States for the
Northern District of Texas

(December 6, 1940)

Before Foster, Holmes, and McCord, Circuit Judges

HOLMES, Circuit Judge:

We are met at the threshold of this case with a question of removal jurisdiction. It is whether or not a counter-claim set up by the defendant in a state court, filed by

way of defense and for affirmative relief, is a suit which is [fol. 129] removable by the plaintiff and cross-defendant under Section 28 of the Judicial Code.¹ The court below answered this question affirmatively, and overruled a motion to remand. From a final judgment on the merits in favor of the original plaintiff (appellee here), the defendants who set up the counter-claim have appealed to this court.

The appellee, a Delaware corporation, sued the appellants, citizens of Texas, in the district court of Potter County, Texas, for the sum of \$5390.42, alleged to be due the plaintiff upon an open account for the purchase price of goods sold by it to the defendants. At the instance of the defendants, upon a plea of privilege, the action was transferred to the district court of the county of their residence. Then the defendants filed their answer in the state court. It contained a general demurrer and a general denial, but no specific debit items were denied and no additional credit items were alleged; it sought to defeat the entire action on the ground that the contract sued upon was in violation of the anti-trust statutes of Texas, and therefore void. In addition, the defendants filed what they called a set-off and cross-action, whereby they demanded of the plaintiff damages in a sum in excess of three thousand dollars, exclusive of interest and costs. Defendants prayed that, on final hearing, the plaintiff take nothing by its suit against them, and that they have judgment against the said plaintiff on their cross-action.

The damages sought by the defendants against the plaintiff arose at a different time and out of the alleged breach of separate and distinct contracts from the indebtedness due the plaintiff. While the defendants prayed that damages in the sum of \$5000 be allowed as a set-off to any claim which the plaintiff might have against them, they denied the validity of any such claim, and finally prayed for a judgment against the plaintiff in the full sum of \$7200 and [fol. 130] all costs of suit. We have, then, a case where the plaintiff elected to sue in a state court for more than three thousand dollars, and the defendants not only denied the existence of any such claim, but sought by cross-action to recover damages in the sum of \$7200; whereupon, the

¹ 28 U. S. C. A. 71.

plaintiff and cross-defendant filed a petition to remove the whole suit to the federal court. The question presented depends entirely upon the proper construction of the applicable provision of the present removal statute.²

From 1875 to 1887, the right of removal on the ground of diversity of citizenship was given to plaintiffs as well as to defendants. At all other periods since the adoption of the Judiciary Act of 1789, such right was limited to defendants, except under the act of 1867, which applied only to cases where there was the additional ground of prejudice and local influence.³ At the present time, only the defendant or defendants, being non-residents of the state in which the suit is brought, may remove the suit into the District Court of the United States. In no instance mentioned in said Section 28 is the right of removal expressly conferred upon a plaintiff or cross-defendant.

The removing party here was the plaintiff in the action filed in the state court, and did not become entitled to remove because of set-off or counter-claim was asserted against it by cross-action. The right to remove is given only to a defendant who has not voluntarily submitted himself to the jurisdiction of the state court, "not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State law to a cross-action."⁴ The decision to this effect, just cited, was under the Judiciary Act of 1789, but the applicable provision thereof was not materially different from the [fol. 131] present statute, the right of removal then and now being given only to the defendant.

In *Waco Hardware Company v. Michigan Stove Co.*, 91 Fed. 289, wherein the plaintiff in the state court sued for less than the federal jurisdictional amount and was met with a counter-claim for a sum greater than such jurisdictional amount, this court refused to read "between the lines of the act" and extend to the plaintiff in a state court a right which, it said, the law clearly intended to give only to the defendant or defendants therein. There are decisions to

² Sec. 28 of the Judicial Code, 28 U. S. C. A. 71.

³ Act of March 2, 1867, 14 Stat., ch. 196, p. 558.

⁴ *West v. Aurora City* (1867), 6 Wall. 139, 18 L. Ed. 819.

the contrary,⁵ but both reason and the weight of authority seem to us to be against allowing the plaintiff to remove because he becomes a cross-defendant in a controversy between citizens of different states having the requisite jurisdictional amount.⁶

The case of *Wichita Royalty Company v. City National Bank*⁷ is cited by appellee to sustain removal. It involved a federal question and not diversity of citizenship. The cross-bill brought in new parties, including the receiver of an insolvent national bank which had closed its doors since the original suit was filed; it might and probably [fol. 132] should have been filed as an independent suit; it certainly should have been characterized as a supplemental cross-bill; but be that as it may, this cross-bill was construed by the district court to be "really a bill to wind

⁵ *Carson & Rand Lumber Co. v. Holtzelaw* (1889, C. C. Mo.), 39 Fed. 578; *Walcott v. Watson* (1891, C. C. Nev.), 46 Fed. 529; *Price & Hart v. T. J. Ellis & Co.* (1904, C. C. Ark.), 129 Fed. 482; *Hagerla v. Mississippi River Power Co.* (1912, D. C. Iowa), 202 Fed. 771; *Hansen v. Pacific Coast Asphalt Cement Co.* (1917, D. C. Cal.), 243 Fed. 283, 284; *Consolidated Textile Corporation v. Iserson* (1923, D. C. N. Y.), 294 Fed. 289; *Pierce v. Desmond* (1926, D. C. Minn.), 11 F. (2) 327; *Zumbrunn v. Schwartz* (1927, D. C. Ind.), 17 F. (2) 609; *O'Neill Bros. v. Crowley* (1938, D. C. S. C.), 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms v. Shandy* (1928, D. C. Kans.), 29 F. (2) 579; *Bankers Securities Corporation v. Insurance Equities Corporation* (1936, C. C. A. N. J.), 85 F. (2) 856; *Chambers v. Skelly Oil Co.* (1937, C. C. A. Kans.), 87 F. (2) 853.

⁶ *West v. Aurora City* (1867), 6 Wall. 139, 18 L. Ed. 819; *Waco Hardware Co. v. Michigan Stove Co.* (1899, C. C. A. Tex.), 91 Fed. 289; *McKown v. Kansas & Texas Coal Co.* (1901, C. C. Ark.), 105 Fed. 657; *Indiana Mountain Jellico Coal Co. v. Asheville Ice & Coal Co.* (1905, C. C. N. C.), 135 Fed. 837; *Illinois Central Ry. Co. v. A. Waller & Co.* (1908, C. C. Ky.), 164 Fed. 358; *Glover Mach. Works v. Cooke-Jellico Coal Co.* (1915, D. C. Ky.), 222 Fed. 531; *Mohawk Rubber Co. v. Terrell* (1926, D. C. Mo.), 13 F. (2) 266.

⁷ 306 U. S. 103, 95 F. (2) 671, 97 F. (2) 249, 18 Fed. Supp. 609.

up the affairs of the bank." ⁸ The Circuit Court of Appeals concurred in this construction, ⁹ and the jurisdictional point was not mentioned by the Supreme Court in its opinion.

Only defendants may remove, either on the ground of a federal question or by reason of diversity of citizenship. In cases of diversity the right is given only to non-resident defendants. In both cases all of the defendants must join in the petition to remove, except where there is a separable controversy wholly between citizens of different states. In all other respects the statutory provisions with reference to removal are substantially the same in cases involving federal questions as in those depending upon diversity of citizenship; and yet the principle which controlled the decision in *West v. Aurora City* was not overruled by the decision in *Wichita Royalty Co. v. City National Bank*, *supra*, because of the distinguishing facts mentioned in the preceding paragraph.

Although directly in point, it is said that *West v. Aurora City* is an old case which has lost its value by changes in the statute. Exactly the reverse is true; it has gained in value as an authority by the course of legislation on the subject, because the pertinent provision at this time is the same as when that decision was rendered, and the intervening changes, expanding and then contracting the right of removal, emphasize the legislative intent to limit it to [fol. 133] the defendant in the statute in force at the present time.

We have seen that the *Aurora City* case was decided in 1867, when only defendants were given the right to remove. By the act of 1875, *supra*, the right to remove was extended to either party, and this act, which repealed the provision

⁸ *City National Bank v. Wichita Falls*, 18 Fed. Supp. 609, 610.

⁹ Upon the matter of winding up the affairs of the old bank, this court said (95 F. (2) 671, 674): "The [United States] District Court has a special jurisdiction of such a case. 28 U. S. C. A. 41(16); *International Trust Co. v. Weeks*, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224. It has been held indeed that where no other relief is prayed a state court should not exercise jurisdiction. *Birdsey v. Commercial National Bank*, 143 Ga. 627, 85 S. E. 881."

of the Judiciary Act of 1789 limiting the right of removal to defendants only, necessarily repealed the construction thereof which held that a plaintiff or cross-defendant was not entitled to remove under the act of 1789. The act of 1875, which permitted either the plaintiff or defendant to remove, was repealed by the act of 1887-8,¹⁰ which reenacted the applicable provision of the act of 1789 restricting the right of removal to the defendant or defendants. In re-adopting that provision, the Congress naturally readopted the construction which had been put upon it in *West v. Aurora City*, supra. The same provision with the same construction is now a part of Section 28 of the Judicial Code. That interpretation cannot be lightly put aside without violating well-settled rules of statutory construction.

The general purpose of the act of 1887-8, supra, was to contract federal removal jurisdiction; a special purpose was to take away from plaintiffs the right of removal which had been given to them by the act of 1875, supra. This was clearly evidenced by omitting the words "either party" which had been used in the act of 1875, and employing the words "defendant or defendants therein being non-residents of the state." We have, then, this situation: In 1867 the right of removal was limited by statute to non-resident defendants, which statute was held not to include plaintiffs who were also cross-defendants; in 1875 the statute was amended so as to include "either party," which, of course, [fol. 134] embraced plaintiffs whether or not they were also cross-defendants; in 1887 the statute was again amended, omitting the use of the words "either party," and making no reference to plaintiffs or cross-defendants, but expressly limiting the right to non-resident defendants. It would not be reasonable to conclude that Congress reenacted the pertinent provision of the law in force in 1867, and rejected the construction which had been put upon that provision by the Supreme Court at that time. If this had been the intention, it might easily have been expressed by adding the words "cross-defendant or cross-defendants."

The cases which refuse to follow *West v. Aurora City* because it was under a different law do not mention the

¹⁰ Act of March 3, 1887, 24 Stat., ch. 373, p. 552; Act of Aug. 13, 1888, 25 Stat., ch. 866, p. 433.

distinguishing features. If they did, it would be observed that there is no material difference on the point before us, and that whatever changes were made in 1887 were made with a view of contracting federal removal jurisdiction. In *Mackay v. Uinta Development Company*, 229 U. S. 173, 175, the Supreme Court found "it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for \$1,950, could, by filing a counter-claim for \$3,000, acquire the right to remove the case to the United States Court."

It is argued that a non-resident plaintiff, by going into a state court, does not waive his right to remove to the federal court when a counter-claim is filed against him. This is not a question of waiver, but of whether or not there was a statutory grant in the first instance; and this is a question of congressional intent. The primary purpose of the act of 1887-8 to cut down jurisdiction was effected by limiting the right of removal to non-resident defendants and by [fol. 135] shortening the time allowed to file the petition to remove.¹¹

By the Judiciary Act of 1789, the petition to remove was required to be filed by the defendant at the time of entering his appearance in the state court. By the act of 1875, under which either party was entitled to remove, the filing of the petition was permitted at "any time before the trial or final hearing." By the act of 1887-8, which omitted plaintiffs, the petition was required to be filed by the non-resident defendant at or before the time he was required to plead in the state court. These statutory alterations and refinements reveal no haphazard policy of the Congress; they disclose a definite legislative purpose, at

¹¹ That the object was to contract jurisdiction has been emphasized in a number of cases. See *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. 303, 33 L. Ed. 635; *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. 141, 34 L. Ed. 738; *Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. 207, 35 L. Ed. 1080; *Hanrick v. Hanrick*, 153 U. S. 192, 197, 14 Sup. Ct. 835, 38 L. Ed. 685.

different periods in our history, first of expanding and then of contracting federal removal jurisdiction.¹²

Section 28 of the Judicial Code names the persons entitled to remove; section 29 provides how any person entitled to remove may exercise the right. He may file a petition in the state court at or before the time the defendant is required to plead or answer. This provision contemplates the defendant, not the plaintiff, as the party entitled to remove. No time is fixed within which a plaintiff or cross-defendant may petition to remove. In actual practice, the time limit upon filing the petition to remove, designed only for defendants, would generally deny that right to plaintiffs who are made cross-defendants. We should not ascribe to the Congress an implied intention to [fol. 136] accord to cross-defendants a right to remove when the statute under consideration contains a procedural provision which shows that the exercise of such right by plaintiffs and cross-defendants was not within the legislative contemplation at the time of the enactment.

The judgment appealed from is reversed, and the cause remanded to the district court with instructions to remand the same to the state court from which it was removed.

[fol. 137]

JUDGMENT

Extract from the Minutes of December 6, 1940

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as
Friona Independent Oil Company,

versus

SHAMROCK OIL AND GAS CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for

¹² See also Act of July 27, 1866, 14 Stat. 306; Act of March 2, 1867, 14 Stat. 558. These were special statutes which broadened the jurisdiction, and permitted the petition for removal to be filed at any time before the trial or final hearing of the cause; the act of 1866 permitted only the defendant to remove, but that act was amended by the act of 1867, which extended the right of removal to either plaintiff or defendant in cases of prejudice or local influence.

the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with instructions to remand the same to the state court from which it was removed;

It is further ordered and adjudged that the appellee, Shamrock Oil and Gas Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

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[fols. 138-146] PETITION FOR REHEARING—Filed December
26, 1940

IN THE
United States Circuit Court of Appeals
FIFTH CIRCUIT.

No. 9568.

G. OBIE SHEETS AND CHESTER SHEETS, DOING
BUSINESS AS FRIONA INDEPENDENT OIL
COMPANY, APPELLANTS,

VS.

THE SHAMROCK OIL AND GAS CORPORATION,
APPELLEE.

APPEALED FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF TEXAS,
AMARILLO DIVISION.

APPELLEE'S PETITION FOR REHEARING.

Appellee, The Shamrock Oil and Gas Corporation, respectfully petitions for a rehearing of the above entitled and numbered cause, and prays that upon such rehearing the decision and judgment of this Honorable Court in these proceedings rendered on the 6th day of December, 1940, be set aside, and that the judgment and action of the trial court be affirmed. As grounds for such rehearing appellee submits:

GROUND NO. I.

The decision of this Honorable Court, rendered on the 6th day of December, 1940, in holding, that the original plaintiff in an action filed in a state court does not become a defendant in a cross action or counterclaim filed by the original defendant, which cross action involves a transaction entirely separate and distinct from and arising at a different time than the indebtedness sued upon by the original plaintiff, and that such defendant in the cross action or counterclaim is not a defendant entitled to remove such cross action or counterclaim to the Federal Courts under the removal statute now in force on the ground of diversity of citizenship and jurisdictional amount, is contrary to and in conflict with the numerical weight of authority, including the following cases, to-wit:

Bankers Securities Corporation v. Insurance Equities Corporation, (C. C. A. 3rd Circuit N. J. 1936), 85 Fed. (2d) 856.

Chambèrs v. Skelly Oil Co., (C. C. A. 10th Cir. 1937), 87 Fed. (2d) 853.

Wichita Royalty Co. v. City National Bank, (D. C. Tex.), 18 F. Supp. 609, Affirmed (C. C. A. 5th Cir. 1938), 95 Fed. (2d) 671, 306 U. S. 103, 83 L. Ed. 515.

Carson and Rand Lumber Co. v. Holtzclaw, (D. C. Mo. 1889), 39 Fed. 578.

Walcott v. Watson, (C. C. Nev. 1891), 46 Fed. 529.

Price & Hart v. I. J. Ellis & Co., (C. C. Ark. 1904), 129 Fed. 482.

Hagerla v. Mississippi River Power Co., (C. C. Iowa 1912), 202 Fed. 771.

Hansen v. Pacific Coast Asphalt-Cement Co.,
(D. C. Calif. 1917), 243 Fed. 283.

Chicago, M. & St. P. Ry. Co. v. City of Spencer,
(D. C. Iowa 1922), 283 Fed. 824.

Consolidated Textile Corporation v. Iserson, (D.
C. N. Y. 1923), 294 Fed. 289.

Pierce v. Desmond, (D. C. Minn. 1926), 11 Fed.
(2d) 327.

Mohawk Rubber Co. of New York v. Terrell, (D.
C. Mo. 1926), 13 Fed. (2d) 266.

Zumbrunn v. Schwartz, (D. C. Ind. 1927), 17
Fed. (2d) 609.

San Antonio Suburban Irrigated Farms v.
Shandy, (D. C. Kan. 1928), 29 Fed. (2d) 579.

Evetts v. Peoples Life Insurance Co., (D. C.
Tex. 1929), 36 Fed. (2d) 832.

American Fruit Growers, Inc. v. La Roche, (D.
C. S. C. 1928), 39 Fed. (2d) 243.

Groveville Sales Corporation v. Stevens, (D. C.
N. J. 1936), 16 Fed. Supp. 563.

O'Neill Bros., Inc. v. Crowley, (D. C. S. C. 1938),
24 F. Supp. 705.

Baker v. Keebler, (D. C. Tenn. 1939), 29 F.
Supp. 555.

Mason City & Ft. Dodge Ry. Co. v. Boynton, 204
U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Merchants Heat & Light Co. v. James B. Clow
& Sons, 204 U. S. 286, 51 L. Ed. 488.

GROUND NO. II.

This Honorable Court erred in holding that the decision in the case of *West v. City of Aurora*, (1867, 6 Wall 139, 18 Leb. 819) is decisive of this case, and erred in holding that there is no difference in the removal act of 1789 under which the *West* case was decided and the present removal statute, for the following reasons:

(a) The removal act of 1789 provided that

"* * * the defendant shall, *at the time of entering his appearance in such state court*, file a petition for the removal of the cause for trial into the next circuit court * * *." (Italics our own). Section 12, 1 Stat. 79, historical note 28, U. S. C. A. Section 71.

The decision in the West case strictly followed such statute as indicated by the statement in the West case, "that the right of removal is given only to a defendant who has not submitted himself to the jurisdiction"; whereas the statute now in force contains no such provision above quoted and accords the right of removal to the "defendant or defendants therein, being non residents of that state", 28 U. S. C. A. Section 71, and as pointed out in a number of the cases cited under the preceding ground such term "defendant" or "defendants" can be applied to and includes a defendant in a cross action or counterclaim.

(b) The so-called cross action filed in the case of *West v. The City of Aurora*, as pointed out in the opinion of the Supreme Court, set up defensive matters and was in the nature of a defensive plea coupled with a prayer for an injunction and involved matters or transactions interrelated with the cause of action originally sued upon, and the so-called cross action was not a suit, or at least not such a suit as could be removed; while in the instant case the cross action or counterclaim filed by the appellants in the state court stated a new, separate and distinct cause of action occurring at a different time and entirely unrelated to the indebtedness sued upon by the original plaintiff. The cross action or counterclaim in the instant case was a suit which could have been independently filed and tried in a separate and distinct proceedings, and in such cross action or counterclaim the original defendants became plaintiffs and actors as to such cross action, and the original plaintiff became a defendant as to such cross action under controlling Texas and Federal decisions (see cases cited under Counter

Proposition Two in Brief of Appellee heretofore filed herein).

GROUND NO. III.

Appellee respectfully submits that the opinion and decision in the instant case is in conflict with the prior opinion and decision of this Court in the case of *Wichita Royalty Company v. City National Bank of Wichita Falls*, (C. C. A. 5th Cir. 1938), 95 Fed. (2d) 671, which affirmed the decision of the trial court, 18 F. Supp. 609, and which case was subsequently passed upon by the Supreme Court of the United States without referring to the jurisdictional question and without in anywise questioning the decision of this Court to the effect that such case was properly removed, 306 U. S. 103, 83 L. Ed. 515; and it is further respectfully submitted that the instant case is not distinguishable in principle from the *Wichita Royalty Company* case for the following reasons:

It is true that the *Wichita Royalty* case involved a cross action or cross bill presenting a Federal question, while the cross action or counterclaim in the instant case involves diversity of citizenship and jurisdictional amount. It is true that the cross bill in the *Wichita Royalty* case brought in new parties, but the decision of this Honorable Court reflects that the portion of the cross action or cross bill relied upon as presenting a suit involving a Federal question was that part of the cross bill that sought the winding up of the affairs of the old bank, the party that originally instituted the suit; the old bank, that is, the original plaintiff, joined with the new parties in removing the case to the Federal Court. Hence the *Wichita Royalty Company* case involved a cross action or cross bill presenting a matter unrelated to the original suit, just as in the present case the cross action or counterclaim presents a cause of action arising at a different time and growing out of an entirely separate and distinct transaction from the indebtedness originally sued upon. What is said in the opinion in the instant case relative to the cross bill in

the Wichita Royalty case, to-wit; “* * * it might and probably should have been filed as an independent suit * * *”, is equally true and applicable to the cross action or counterclaim here involved. In the instant case, as in the Wichita Royalty case, all of the defendants in the cross action removed the case; the only distinguishing feature in the two cases being that in one case the ground for removal was the Federal question, and in the other case the ground for removal was diversity of citizenship. The cross action in each of the cases presented a cause of action independent of and unrelated to the matter originally sued upon, and in each case the original plaintiff, who became the defendant as to such independent matters so presented in the respective cross actions, removed, or participated in the removal of the case. In the present case, as in the Wichita Royalty case, the removal of the cross action carried with it the matters presented in the original suit.

GROUND NO. IV.

The decision of this Honorable Court that the appellee herein was not a defendant within the meaning and intent of the present removal statute, and was, therefore, not entitled to remove the cause of action presented in the counterclaim or cross action, even though, as recognized in the opinion of this Court, the damages sought in the cross action or counterclaim arose at a different time and out of the alleged breach of a separate and distinct contract from the indebtedness originally sued upon, is contrary to and in conflict with the established line of decisions of the Federal Courts that under the removal act of 1875 and subsequent removal acts, including the present removal statutes, that the real matter in controversy should be ascertained and the parties realigned without regard to the name or designation assigned such parties in the pleadings. The decision in the instant case conflicts, in such regard, with the following decisions, reaffirming the rule relating to realignment of parties and applying same to identical or similar fact situations to the one here involved:

- Removal Cases, (1879), 100 U. S. 457, 25 L. Ed. 593.
- Brown v. Ironsedale*, (1891), 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987.
- Wilson v. Oswego Township*, (1894), 151 U. S. 56, 63, 14 Sup. Ct. 259, 38 L. Ed. 70.
- Merchants Cotton Press & Storage Co. v. The Insurance Company of North America*, (1894), 151 U. S. 368, 385, 14 S. Ct. 367, 38 L. Ed. 195, 204.
- Merchants Heat & Light Co. v. James B. Clow & Sons*, (1907), 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488.
- Mason City & Fort Dodge R. R. Co. v. Boynton*, (1907), 204 U. S. 570, 27 S. Ct. 321, 51 L. Ed. 629.
- Venner v. Great Northern Railway Company*, (1908), 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 666.
- Niles-Bennett-Pond Co. v. Iron Moulders Union*, (1920), 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145.
- Harrison v. Harrison*, (D. C. Miss. 1922), 5. F. (2d) 1001.
- Zumbrunn v. Schwartz*, (D. C. Ind. 1927), 17 F. (2d) 609.
- O'Neill Bros. v. Crowley*, (D. C. S. C. 1938), 24 F. Sup. 705.

GROUND NO. V.

In applying a strict construction to the words "defendant" or "defendants" used in the removal statute and in holding that such terms do not include a cross defendant or a plaintiff who becomes a defendant in a cross action involving an entirely new cause of action, the decision of this Honorable Court, when carried to its logical conclusion, is in conflict with that line of de-

cisions permitting a defendant brought in by a cross bill to remove the action to the Federal Court, of which line of authorities the following cases are examples:

Habermel v. Mong, (C. C. A. 6th Cir. 1929), 31 F. (2d) 822. Writ of Cert. denied 280 U. S. 587, 50 S. Ct. 37, 74 L. Ed. 636.

Ellis v. Peak, (D. C. Tex. 1938), 22 F. Supp. 908.

GROUND NO. VI.

In applying a strict construction to Section 29 of the Judicial Code, being the procedural statute governing the right of removal, the opinion of this Honorable Court conflicts with the decision of the Supreme Court in *Powers v. Chesapeake and Ohio Ry. Co.*, 169 U. S. 92, 42 L. Ed. 673, which decision requires a reasonable construction of the act; and the opinion herein, in holding that the provisions in such section of the Judicial Code relative to the time that the petition for removal must be filed prevents a removal by anyone except an original defendant, conflicts with the decisions cited under Ground No. I and Ground No. V hereof, which hold, in so far as such cross action or cross bill is concerned, that the time for filing such petition for removal is at or before the time the defendant in the cross action or cross bill is required to answer such cross action or cross bill.

GROUND NO. VII.

This Honorable Court erred in holding that it had jurisdiction of the appeal of this case as being an appeal from a final judgment, for the reason that the transcript of the record reflects that no appeal was taken from the final judgment on the merits rendered on the 13th day of October, 1939, (Tr. 81), or from the order overruling the motion for new trial (Tr. 93), but upon the contrary, the notice of appeal (Tr. 95), appellants' application for leave to appeal (Tr. 101), and the order allowing an appeal (Tr. 103) reflect that the appeal in this case was

taken from the trial court's order overruling the appellants' motion to remand, and from the order of the Court overruling the motion for a reconsideration of the Court's order overruling defendant's motion to remand. Such orders are not final judgments from which an appeal may be taken.

Bender v. The Pennsylvania Company, 148 U. S. 502, 13 S. Ct. 640, 37 L. Ed. 537.

Arthur v. Edmunds, (C. C. A. Fifth Circuit), 66 Fed. (2d) 21.

Lockhart v. New York Life Insurance Co., (C. C. A. Fourth Circuit), 71 Fed. (2d) 684.

Klein v. Wilson & Co., (C. C. A. Third Circuit), 7 Fed. (2d) 777.

WHEREFORE, for all of the reasons and grounds heretofore assigned, appellee petitions and prays that a rehearing of this cause be granted, and that upon such rehearing the decision and judgment rendered by this Honorable Court in these proceedings on the 6th day of December, 1940, be reversed and set aside, and the judgment and action of the trial court be in all things affirmed.

Respectfully submitted.

.....
Of Counsel.

R. E. UNDERWOOD,
R. C. JOHNSON,
J. B. DOOLEY,
R. A. WILSON,
W. M. SUTTON,

All of Amarillo, Texas,
Attorneys for Appellee.

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[fol. 147] ORDER DENYING REHEARING

Extract from the Minutes of January 14, 1941

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as
Friona Independent Oil Company,

versus

SHAMROCK OIL AND GAS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 148] MOTION AND ORDER STAYING MANDATE—Filed
January 18, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as
Friona Independent Oil Company, Appellants

vs.

THE SHAMROCK OIL AND GAS CORPORATION, Appellee

Appeal from the District Court of the United States for
the Northern District of Texas

Petition of The Shamrock Oil and Gas Corporation, Appellee, for an Order Staying the Issuance of the Mandate, Execution and Enforcement of the Judgment of the United States Circuit Court of Appeals for the Fifth Circuit to Enable Said The Shamrock Oil and Gas Corporation to Apply for and Obtain Writ of Certiorari from the Supreme Court

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit or Any Judge Thereof:

Your Petitioner, The Shamrock Oil and Gas Corporation, respectfully presents this its application for a stay of the

mandate and the execution and enforcement of the judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit rendered in the above cause on the 6th day of December, 1940, to enable petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States and as grounds therefor shows as follows:

The judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit was rendered on the 6th day of December, 1940, and thereafter within twenty-one days after the date of such decision and on the 26th [fol. 149] day of December, 1940, the appellee, The Shamrock Oil and Gas Corporation, filed with the Clerk of said Court its petition for rehearing, which petition for rehearing was thereafter denied by this Honorable Court by an order entered on the 14th day of January, 1941.

Petitioner shows that it is the bona fide intention of the appellee to make proper application to the Supreme Court of the United States for writ of certiorari in this case within the time provided by law and in support hereof appellee attaches the professional statement of its counsel, W. M. Sutton, of Amarillo, Texas.

Petitioner shows that if it should be determined that as a condition to the granting of this application for the stay of the issuance of mandate, execution and enforcement of judgment, that the appellee be required to give security, conditioned that should it fail to make application for such writ within the period allotted therefor or fail to obtain an order granting its application or fail to make its plea good in the Supreme Court, that it will answer for all damages and costs which the appellants may sustain by reason of the stay, that appellee stands ready to make such security, if so required, in such amount as it may be required.

Wherefore, premises considered, petitioner prays that order staying the mandate, execution and enforcement of judgment be entered and that the issuance of mandate, execution and enforcement of judgment be stayed for a period of sixty days from this date or for a lesser period, if it should be determined that a lesser period is sufficient, and if the application for writ of certiorari is filed within such period that the issuance of mandate, execution and

enforcement of judgment be further stayed until such application is finally determined.

Respectfully submitted, W. M. Sutton, of Counsel.
R. E. Underwood, R. C. Johnson, J. B. Dooley,
R. A. Wilson, W. M. Sutton, all of Amarillo, Texas.
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I, W. M. Sutton, counsel for The Shamrock Oil and Gas Corporation, appellee, certify that it is the bona fide intention of the appellee, The Shamrock Oil and Gas Corporation, to make application to the Supreme Court of the United States for writ of certiorari within the time allowed by law and that I believe there is merit in this case and the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

W. M. Sutton.

[fol. 151] **UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH DISTRICT**

No. 9568

**G. OBIE SHEETS and CHESTER SHEETS, Doing Business as
Friona Independent Oil Company, Appellants,**

versus

SHAMROCK OIL and GAS CORPORATION, Appellee

On consideration of the application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court

the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 18th day of January, 1941.

(Signed) E. R. Holmes, United States Circuit Judge.

[fol. 152] - Clerk's certificate to foregoing transcript omitted in printing.

[fol. 153] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the first question presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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